103

(1)

Supreme Court, U.S.
FILED

08-278 AUG 28 2008

OFFICE OF THE CLERK
William K. Suter, Clerk

No. _____

IN THE

Supreme Court of the United States

INCOR, SHELTERED WORK ACTIVITY PROGRAM, INC., ET AL.,

Petitioners,

vs.

KENT W. FOWLER, ET. AL., INDIVIDUALLY AND STANDING IN THE STEAD OF OTHER PERSONS SIMILARLY SITUATED

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Adam Scott Weintraub
Counsel of Record
Terry S. O'Donnell
Savage, O'Donnell, Affeldt,
Weintraub & Johnson
110 W. 7th Street, Suite 1010
Tulsa, OK 74119
(918) 599-8400
Attorneys for Petitioners

ISSUE PRESENTED FOR REVIEW

Whether in determining the definition of a "private home" under the companionship services exemption to the Fair Labor Standards Act ("FLSA") the United States Court of Appeals for the Tenth Circuit has created an incomprehensible standard by applying factors in a way that disparately discriminates against the most severely developmentally disabled individuals in violation of the spirit and purpose of the Americans with Disabilities Act and frustrates the United States Supreme Court's decision in *Long Island Care at Home, Ltd. v. Coke*, 127 S.Ct. 2339 (2007).

LIST OF PARTIES TO THE PROCEEDINGS

Petitioners INCOR, Sheltered Work Activity Program, Inc., d/b/a INCOR, Edward Breen and Betsy Breen were defendants in the district court and appellees in the court of appeals.

Respondents are the following 33 individuals and standing in the stead of other persons similarly situated were plaintiffs in the district court and appellants in the court of appeals:

Kent W. Fowler
Cody Fowler
Larry Burris
Michael Leach
Frances Woods
Roseola Thornburg
Katherine Carroll
Bettie Burnett
Lisa Smith
Alice Smith
Lesa Horney
Christine Lane-Huckabay
Kenya Washington
Yolanda White
Angela McVay
Wakeetha Atkeson
Angie Miller
Ruby McGee
Carmen Kirkland
Anntonett Taylor
Deloris Wilson

Tia Sallis
Sherry Sallis
Bruce McCarthy
Nicole Pierce
CynthiaWhitefield
Joretta Truitt
Judy Blackmer
Lajoya Davis
Leceif Spring
Misty Graham
Sonya July
Stephanie Newman

CORPORATE DISCLOSURE STATEMENT

Petitioner Sheltered Work Activity Program, Inc., d/b/a Incor, has no parent company, and there are no publicly held companies that hold any stock of Sheltered Work Activity Program, Inc.

TABLE OF CONTENTS

PAGE

ISSUE PRESENTED FOR REVIEW i

LIST OF PARTIES TO THE PROCEEDINGS ii

CORPORATE DISCLOSURE STATEMENT iv

TABLE OF AUTHORITIES viii

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY AND REGULATORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

I. The Legislative History Behind The Companionship Services Exemption 6

II. Importance of the Companionship Exemption of the FLSA to the home health care industry as a whole. 9

III. Legal Requirements for Utilization of the Companionship Services Exemption 11

IV. The "private home" factors identified by the Tenth Circuit Court of Appeals and their discriminatory impact on the severely developmentally disabled 12

REASONS FOR GRANTING THE PETITION 18

1) The United States Court of Appeals for the Tenth Circuit has decided a question of extreme public importance under the Fair Labor Standards Act which has not been, but should be, settled by this Court. 18

2) The United States Court of Appeals for the Tenth Circuit has entered a decision that conflicts with the spirit and objective of the Americans with Disabilities Act and disproportionately discriminates against the most severely developmentally disabled 20

3) The United States Court of Appeals for the Tenth Circuit has interpreted a federal regulation in a way that frustrates the purpose of relevant decisions of the United States Supreme Court 30

CONCLUSION 32

APPENDIX

APPENDIX A A1-A54
ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

APPENDIX B B1-B190
JUDGMENT AND FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

APPENDIX C C1-C2
ORDER DENYING PETITION FOR REHEARING UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

APPENDIX D D1-D8
AMERICANS WITH DISABILITIES ACT OF 1990, 42 U.S.C. § 12101, §§ 12131-12134

TABLE OF AUTHORITIES

Cases: PAGE

Bowler v. Deseret Village Ass'n, Inc.,
922 P.2d 8 (Utah 1996) 13

Homeward Bound, Inc. v. Hissom Mem'l Ctr.,
No. 85-C-437-E, 1987 WL 27104
(N.D. Okla. July 24, 1987) 5 n.1

Long Island Care at Home, Limited v. Coke,
127 S. Ct. 2339 (2007) 4, 6, 8, 30

McCune v. Oregon Senior Services Division,
894 F.2d 1107 (1990) 9

Olmstead v. L.C., 527 U.S. 581,
119 S. Ct. 2176, 144 L.Ed. 2d 540 (1999) . 17, 22, 28

Rice v. Sioux City Memorial Park Cemetery, Inc.,
349 U.S. 70 (1955) 31

Welding v. Bios,
353 F.3d 1214 (10th Cir. 2004) 13-16, 23-28, 29

Statutes, Rules and Regulations:

28 U.S.C. § 1254(1) 1

29 U.S.C. § 213(a)(15) 2, 6, 7, 8

42 U.S.C. § 12101 ..... 3, 20-22, App. D1-D4

29 C.F.R. § 552.3 ..... 2, 11-12, 18

29 C.F.R. § 552.6 ..... 3, 7, 12

29 C.F.R. § 552.109(a) 3, 30, 31

Petitioners Incor, Sheltered Work Activity Program, Inc., an Oklahoma Corporation, d/b/a Incor, Edward Breen and Betsy Breen ("Petitioners") respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is not reported in a federal reporter, however, it is cited at 2008 WL 2019598 (10th Cir. (Okla.)), 155 Lab. Cas. P 35,431, 13 Wage & Hour Cas. 2d (BNA) 1111. The court of appeal's Order and Judgment is reprinted in App. A at A1-A54. The district court's opinion is unreported. The district court's Judgment and Findings of Fact and Conclusions of Law supporting the Judgment are reprinted in App. B at B1-B190.

JURISDICTION

The court of appeals entered judgment on May 12, 2008. A petition for rehearing with suggestion for rehearing *en banc* was denied on June 3, 2008 and is reproduced in App. C at C1-C2. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. In pertinent part, section 13(a)(15) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 213(a)(15) ("§ 213(a)(15)") provides:

> (a) Minimum wage and maximum hour requirements
>
> The provisions of section 206 (except subsection (d) in the case of paragraph (1) of this subsection) and section 207 of this title shall not apply with respect to--
>
> (15) any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves.

2. In pertinent part, 29 C.F.R. § 552.3 provides:

> Domestic service employment.
>
> As used in section 13(a)(15) of the Act, the term *domestic service employment* refers to services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed.

3. In pertinent part, 29 C.F.R. § 552.6 provides:

   Companionship services for the aged or infirm.

   As used in section 13(a)(15) of the Act, the term *companionship services* shall mean those services which provide fellowship, care, and protection for a person who, because of advanced age or infirmity, cannot care for his or her own needs.

4. In pertinent part, 29 C.F.R. § 552.109(a) provides:

   Third party employment

   (a) Employees who are engaged in providing companionship services, as defined in § 552.6, and who are employed by an employer or agency other than the family or household using their services, are exempt from the Act's minimum wage and overtime pay requirements by virtue of section 13(a)(15).

5. Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, §§ 12131-12134 reprinted in Appendix D at D1-D8.

STATEMENT OF THE CASE

This case concerns whether in determining the definition of a "private home" under the companionship services exemption to the Fair Labor Standards Act ("FLSA") the United States Court of Appeals for the Tenth Circuit has created an incomprehensible standard by applying factors in a way that disparately discriminates against the most severely developmentally disabled individuals in violation of the spirit and purpose of the Americans with Disabilities Act and frustrates the United States Supreme Court's decision in *Long Island Care at Home, Ltd. v. Coke*, 127 S.Ct. 2339 (2007).

Petitioners (collectively "Incor") are a non-profit provider of services to developmentally disabled individuals (people with an I.Q. of less than 75, collectively "clients") in northeastern Oklahoma, which includes providing in-home habilitation services. The clients, most of whom have both severe physical and developmental disabilities, and/or their guardians hire Incor to provide a range of in-home services for the clients which allows them to live in their own homes and avoid institutionalization. Incor's residential program is regulated by and funded through the Oklahoma Department of Human Services, Developmental Disabilities Services Division ("DDSD"). Approximately 98% of the funding for the residential program is provided by state and federal funding through the state of Oklahoma. The DDSD is charged with ensuring that the

developmentally disabled receive quality care from their service providers. The DDSD accomplishes this goal by entering into contracts with different service providers. These contracts set out requirements that must be met before the provider will be reimbursed for services provided to the developmentally disabled. The DDSD contract requirements are enforced through state employed Case Managers. The provision of these in-home services was initiated following litigation to deinstitutionalize individuals with developmental disabilities.[1]

In order to provide in-home services, Incor employs Habilitation Training Specialists ("HTS") and/or House Managers to provide care to its clients. Pursuant to the DDSD contract with service providers, HTS hours are reimbursed to the service providers at a flat rate, regardless of whether the individual HTS worked over forty

---

[1] In *Homeward Bound, Inc. v. Hissom Mem'l Ctr.*, No. 85-C-437-E, 1987 WL 27104 (N.D. Okla. July 24, 1987) the United States District Court for the Northern District of Oklahoma ordered deinstitutionalization of patients in Hissom by placing them in the least restrictive environment suitable for their needs. The goal of the court's order was to allow the former patient to live in their own home in the community while ensuring quality care through adequate safeguards. In the *Homeward Bound* decision, the court discussed the hallmarks of institutionalization including: inadequate medical care; harmful and unsanitary environmental conditions; subjection to abuse by staff and other patients; deprivation of privacy; not being provided adequate programming; and an overall deprivation of basic human rights. *Id.* at *10-14.

hours that particular week. Respondents brought the underlying suit against Incor in the United States District Court, Eastern District of Oklahoma, claiming entitlement to back overtime wages flowing from an alleged misapplication of the "Companionship Services" exemption to the overtime provisions of the FLSA § 213(a)(15).

Prior to trial, the district court entered summary judgment for Incor on a variety of legal issues. Thereafter, the district court conducted a bench trial from December 6 – 10, 2004, from which the district court made Findings of Fact and Conclusions of Law (App. B at B1-B190), and entered judgment in favor of Incor and against Respondents on all of their claims. Subsequently, Respondents' appealed the district court's decision to the United States Court of Appeals for the Tenth Circuit which rendered its Order and Judgment on May 12, 2008 (App. A at A1-A54), reversing and remanding the case back to the district court, with the exception of upholding the district court's application of a two-year statute of limitations with respect to Respondents' wage claims.

I) The Legislative History Behind the Companionship Services Exemption

The "Companionship Services" exemption cannot be viewed in a vacuum, and must be viewed in light of its legislative history and intent. *See, e.g., Long Island Care at Home, Ltd. v. Coke*, 127 S.Ct. at 2344. In 1974, Congress enacted legislation which extended the coverage of the

FLSA to include domestic workers. Prior to that time, the FLSA excluded such workers on the ideological grounds that the private home and the work place were separate, and that an individual's home was a "special" place with its control vested in the household's family. However, when extending the FLSA's coverage to domestic employees in 1974, Congress carved out a narrow exception to the domestic service coverage for employees who provide "Companionship Services" to individuals who, because of age or disability, are unable to care for themselves.

The pertinent codes and regulations state as follows: 29 U.S.C. § 213(a)(15) providing that "employee," for the purposes of the act shall not apply to "any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined by regulations of the Secretary)." "Companionship services," are defined in 29 C.F.R. § 552.6, as:

> Those services which provide fellowship, care and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs. Such services may include household work related to the care of the aged or infirmed person such as meal preparation, bed making, washing of clothes, or other similar services.

> They may also include the performance of general household work: Provided, however, that such work is incidental, i.e., does not exceed 20% of the total weekly hours worked. The term "companionship services" does not include services related to the care and protection of the aged or infirm which require and are performed by trained personnel, such as a registered or practical nurse.

By enacting 29 U.S.C. § 213(a)(15), Congress redrew the legal boundary between the public work place and work done within the home itself, exempting a core of personal services excluded from regulation under the FLSA.

Most recently in June of 2007, this Court in *Long Island Care At Home, Ltd. v. Coke,* 127 S.Ct. 2339, upheld the United States Department of Labor's interpretation extending the "Companionship Services" exemption to individuals employed by a third party employer other than the family or household using their services. Although this Court's decision in *Coke* turns on whether the Department of Labor's interpretation of its own regulations was "controlling," this Court clearly had the opportunity to curtail the application of the "Companionship Services" exemption to only those individuals employed directly by the family or household in which they provided services. More importantly, by upholding the extension of the "Companionship Services" exemption to third party

employers, this Court has definitively expanded the application of the exemption and allowed in-home services to reach a much greater population of aged and infirm that otherwise would not be able to afford such in-home services. In discussing the policy reasons for the "Companionship Services" exemption, the Ninth Circuit Court of Appeals has stated, "[w]e are informed that those critical services reach more elderly or infirm individuals than they otherwise would precisely because the care providers are exempt from the FLSA." *McCune v. Oregon Senior Serv. Div.*, 894 F.2d 1107, 1110 (1990). Thus, as a result of the "Companionship Services" exemption, a greater number of older and disabled Americans will be able to remain in their homes as opposed to requiring institutionalization.

II) **Importance of the Companionship Exemption of the FLSA to the home health care industry as a whole.**

The 1974 amendment to the FLSA that established the "Companionship Services" exemption is unique in that Congress offered protection to a class of consumers rather than employees. The main purpose of the exemption is to provide cost protection to the elderly and infirm who require companionship services to remain in their communities and their own homes. The availability of the "Companionship Services" exemption is critical to the health care industry and third party employers in particular. The use of the exemption has two overwhelming advantages,

1) a significant savings to the aged or infirm with regard to costs, and 2) more consistent training and care to the service recipient.

Most funding for home care services comes from the federal and state programs. Under these programs, compensation for hands-on care providers is set at a flat rate per hour. Thus, the employers of care providers have little or no control over the cost of services and can only act to affect the costs of care. As a result, the cost increases due to the service provider's inability to use the "Companionship Services" exemption have lead the service providers to control costs through such steps as eliminating overtime work (thereby increasing the number of different care providers in the home of the aged or infirm), reducing base compensation rates to minimum wage, and dropping employee benefit programs. Consequently, the employees also suffer because they will be subject to capped compensation and limited benefits with no alternative but to find supplemental income through second jobs.

Equally important, the aged and infirm will suffer if the service providers are unable to utilize the "Companionship Services" exemption. The service provider's will be required to limit the hours of work for the HTS's which will disrupt continuity of care as multiple caregivers will be assigned to an individual to avoid overtime compensation. Whether providing services to the aged or infirm, fewer caregivers produce better and more consistent care to the recipients. Clearly in serving the aged and infirm, there are always barriers and

challenges to developing a trusting relationship between the caregivers and the care recipients. Resistance by the aged or infirm to breaking down those barriers often leads to setbacks in the way of "behaviors" or negative training. Thus, the fewer caregivers involved in the lives of the care recipients leads to more trusting relationships and better care for the aged and infirm.

III) Legal Requirements for Utilization of the Companionship Services Exemption

In order to utilize the "Companionship Services" exemption, the employer must show that two principle requirements have been met. First, the employee must have provided domestic services in a "private home"; and second, the employee must have provided "Companionship Services" (i.e. services related to the "protection, care, and fellowship" of the aged or infirm). The United States Department of Labor, has enacted regulations encompassing the "private home" requirement in defining "Companionship Services." According to 29 C.F.R. § 552.3, the services must be provided in or about a private home, more specifically:

> . . . Services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed. The term includes employees such as cooks, waiters,

> butlers, maids, housekeepers, governesses, nurses, janitors, laundresses, caretakers, handymen, gardeners, footmen, grooms, and chauffeurs of automobiles for family use . . ." *Id.* (emphasis added)

Correspondingly, 29 C.F.R. § 552.6 defines "Companionship Services" as:

> . . . Those services which provide **fellowship, care and protection** for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs. Such services include household work related to the care of the aged or infirmed person, such as meal preparation, bed making, washing of clothes and other similar services . . . (emphasis added)

Thus, there are two key requirements under the regulation for utilizing the Companionship Services exemption: 1) the services relate to the "**fellowship, care and protection**" of the client and 2) the services must be provided in a "**private home.**"

IV) The "private home" factors identified by the Tenth Circuit Court of Appeals and their discriminatory impact on the severely developmentally disabled.

Assuming the services provided relate to the "fellowship, care and protection" of the elderly or infirm, the court of appeals has provided guidance regarding the criteria to be considered when attempting to determine whether a home is "private" for purposes of utilizing the "Companionship Services" exemption. In *Welding v. Bios*, 353 F.3d 1214 (10th Cir. 2004), the Tenth Circuit Court of Appeals adopted two "key inquiries" and a six factor test to analyze whether any residence is truly a "private home" for purposes of the "Companionship Services" exemption.

Specifically in *Welding*, the court of appeals adopted the approach of analyzing the "private home" status of the residences occupied by the developmentally disabled along a continuum. The court of appeals states in pertinent part:

> Whether Bios is exempt from paying overtime to any of the plaintiffs here depends on whether any of the residences in which the Plaintiffs provided services to the developmentally disabled individuals should be considered "private homes" as that term is used in the regulations. "[T]he definition of a 'private home' exists along a continuum." *Bowler v. Deseret Village Ass'n, Inc.*, 922 P.2d 8, 13 (Utah 1996). At one end of the continuum is "[a] traditional family home in which a single family resides," which clearly

> constitutes a private home. *Id.* At the other end of the continuum is "an institution primarily engaged in the care of the sick, the aged, the mentally ill or a boarding house used for business or commercial purposes," which clearly do not constitute private homes. *Id.* (quotation omitted). In between lie a variety of living arrangements, many of which may constitutes "private homes" for purposes of the companionship services exemption. *Id.* at 1218.

Later in *Welding*, the court of appeals notes that prior to its pronouncement, the "so-called factors that Courts have considered" when determining the "private home" status of a living unit "have grown like weeds." *Id.* at 1219. Accordingly, the court of appeals adopted a six factor test to assist Courts in determining "who has ultimate management control of the living unit and whether the living unit is maintained primarily to facilitate the provision of assistive services." *Id.*

Petitioners agree that ultimate "control," or the "right to control," the home is the appropriate analysis for determining whether a residence is a "private home" or more akin to an institution for purposes of applying the "Companionship Services" exemption. However, the one-size fits all, "six factor test" to determine private home status set out by the Tenth Circuit in *Welding* is fundamentally flawed.

The six factors that the court of appeals applied in *Welding* are; 1) whether the client lived in the living unit as his or her private home before beginning to receive the services, 2) who owns the living unit, 3) who manages and maintains the residence, 4) whether the client would be allowed to live in the unit if the client were not contracting with the provider for services, 5) the relative difference in the cost/value of the services provided and the total cost of maintaining the living unit (including government subsidies), and finally 6) whether the service provider uses any part of the residence for the provider's own business purposes.[2] *Id.* at 1219-1220. Clearly, the primary issue is who controls or has the right to control the residence. However, as shown below, rigid application of the factors leads to a disparate discriminatory impact

---

[2] Although the court of appeal's decision in *Welding* identifies these six factors in determining the "private home" status of the residences in question, the *Welding* decision does not appear to make the inquiry exclusive to those six factors identified. In concluding its opinion, the court of appeals states:

> To be entitled to the companionship services exemption, Bios must establish the foregoing factors ***and any other factors that may be applicable***, when considered together, clearly and unmistakably establish that the particular living unit in question is a private home.

Id. at 1220 (emphasis added). Thus, "other factors" may be considered on a case by case basis when determining private home status under *Welding*.

on the most severely developmentally disabled home care recipients.

Despite its pronouncement in *Welding*, the court of appeals brushed aside and wholly failed to consider the district court's Findings of Fact and Conclusions of Law. (*See* App. A at A15-A16). For example, since the key inquiries are who has ultimate management control of the residence and whether the residence is maintained primarily to facilitate providing assistive services, the court of appeals should have given consideration (as did the district court (App. B at B37-B40)) to the individual Service Agreements between the client and/or their guardian and Incor. Critically, Incor provided no service not specifically requested by the client and/or guardian. The Service Agreements between the clients and Incor are terminable at will. Instead of recognizing that the Service Agreements allowed the client and his or her guardian to retain control over all aspects of their home, the court of appeals described the Service Agreements as "ancillary agreements," ignoring the fact that the services provided were specifically requested. (App. A at A16). Rather than recognize the client's retention of control through the Service Agreement, the court of appeals looked only to who the actual person was that performed the needed services for the client in order for that client to be able to live in the residence. Specifically the court of appeals cited *Welding* stating that, "[i]f many of the essentials of daily living are provided for by the client or the client's family, that weighs strongly in favor of it being a private home." (App. A at A15).

Sadly, many times there is no family member who is willing and able to provide daily care for an elderly or infirm family member. In such a situation the family or guardian of the elderly or infirm will employ a third party, by use of a Service Agreement, to ensure that their family member receives proper care. In ridiculing the evidence surrounding Incor's Service Agreements, the Tenth Circuit automatically disqualifies homes that may otherwise be "private." As a matter of course, the more disabled the client the more services the client will require, and axiomically the more services required the more this factor will lend to the residence not being a private home.

The six "private home" factors as set out in *Welding*, whether taken as a whole or in part, discriminate against the more profoundly developmentally disabled because they fail to account for the needs and requirements of caring for such an individual. Severely disabled individuals will never reside in a "private home" and in turn, may never utilize the very exemption designed to assist them in obtaining such services. In categorizing these aged or infirm individuals in this way, the Tenth Circuit is relegating the severely disabled as being perpetually categorized as institutionalized, no matter where they reside. Such perpetual institutionalization, this Supreme Court has held is discrimination. *See Olmstead v. L.C.*, 527 U.S. 581, 119 S. Ct. 2176, 144 L.Ed. 2d 540 (1999).

This seems an incomprehensible result from a regulation that's purpose is to keep individuals in

their private homes and out of institutions by providing for affordable, quality home health care.

REASONS FOR GRANTING THE PETITION

Petitioners identify three compelling reasons to grant this petition:

1) **The United States Court of Appeals for the Tenth Circuit has decided a question of extreme public importance under the Fair Labor Standards Act which has not been, but should be settled by this Court.**

This litigation presents a critical question of federal law involving exemptions to the FLSA, specifically the rights of individuals who are infirm due to physical or mental disability or age to receive the highest level of care, service, and habilitation training in the least restrictive environment. This Court's ruling on this question will impact millions of American citizens who require, or will require, companionship services. To date there is no guidance by this Court, or the Department of Labor, concerning the interpretation or clarification of what constitutes a "private home" as contemplated under the "Companionship Services" exemption to the FLSA.

By imposing myopic and pedantic requirements on what constitutes a "private home" under § 552.3, the Tenth Circuit Court of Appeal's decision in this matter very narrowly defines the

"private home" status of the individual's residence, thereby making utilization of the exemption extraordinarily risky and impractical by any employer.

This ruling will have a profoundly negative impact on the home health care sector as a whole. The ability of home health care providers to supply much needed services to millions of infirm and elderly individuals is greatly obstructed by the court of appeal's decision which applies an inconsistent definition and incomprehensible standard of what constitutes a private home.

Further, because public funding pays for the majority of the services provided to the clients in the case at hand, the court of appeal's ruling will severely affect the way in which residents of Oklahoma, and possibly many other states within the Tenth Circuit, receive important health care assistance. The court of appeal's interpretation will make these critical services unaffordable to an increasing number of American citizens seeking home-based companionship services regardless of whether it's private funding or public funding. The point of the exemption is to allow care recipients to stretch their healthcare dollars as far as possible. The court of appeals decision and application of the *Welding* factors disrupts what would in all respects be considered a private home, especially for the clients requiring the highest level of care. In combination, these consequences threaten the important public policy favoring home health care, leaving institutionalization the only option for many.

Although unpublished, the court of appeal's decision threatens to restrict the availability of in-home care to millions of aging and disabled Americans. In order to promote both the availability and continuity of "Companionship Services" to those in need, the FLSA creates a very specific exception to the overtime requirements which should not be hyper-technically defined such that the exemption may only be utilized by those fortunate enough to own their own home or live with family members that manage the individual's lives. In sum, these issues present questions of exceptional importance warranting granting this petition for writ of certiorari.

2) The United States Court of Appeals for the Tenth Circuit has entered a decision that conflicts with the spirit and objective of the Americans with Disabilities Act and disproportionately discriminates against the most severely developmentally disabled.

With the enactment of the American with Disabilities Act of 1990, 42 U.S.C. § 12101, et. seq. ("ADA"), Congress ensured that individuals with disabilities be afforded the opportunity to receive public services and programs in the most integrated setting appropriate for their needs. The court of appeals decision in this case conflicts with the spirit and purpose of the American with Disabilities Act of 1990. Even though the facts of this case may not fit exactly within one of the explicit protections provided by one of the Titles to

the ADA, the Congressional purpose and findings are relevant to this case. In enacting the ADA Congress found that:

> (1) some 43,000,000 Americans have one or more physical or mental disabilities and this number is increasing as the population as a whole is growing older;
> (2) historically, society has tended to isolate and segregate individuals with disabilities, and despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;
> (3) discrimination against individuals with disabilities persists in such critical areas as . . . housing, . . . institutionalization, health services . . .;
>
> * * *
>
> (5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, . . . segregation and relegation to lesser services, programs, activities, . . . or other opportunities;
>
> * * *
>
> (7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subject to a history of purposeful unequal treatment...;
> (8) the Nation's proper goals regarding individuals with disabilities are to assure

> equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; . . . .

42 U.S.C. § 12101(a).

Further, this United States Supreme Court in *Olmstead v. L.C.*, 527 U.S. 581, 119 S. Ct. 2176, 144 L.Ed. 2d 540 (1999), recognized under Title II, the public services portion of the ADA, that States are required to provide community based treatment for persons with mental disabilities when the treating professionals determine placement is appropriate. In *Olmstead*, Respondents were developmentally disabled women who were voluntarily confined for treatment in a psychiatric unit. Even after their treating professionals decided the women could continue their care in a community based program the woman remained institutionalized. The district court found that "unnecessary institutional segregation constitutes discrimination, *per se*." *Id.* at 527 U.S. 582; 119 S.Ct. at 2178. This Supreme Court agreed; "[u]njustified isolation, we hold, is properly regarded as discrimination based on disability." *Id.* at 527 U.S. 587; 119 S.Ct. 2185.

Considering Congress's purpose in passing the ADA and this Court's proclamation that unjustified institutionalization is discrimination based on disability, the *Welding* factors applied by the Tenth Circuit to determine what is a "private home" must be examined for their disparate discriminatory impact on Incor's profoundly developmentally disabled clients. Incor's clients

receive state funding to help provide for their care and state supervision of their quality of care and training. Factors that unduly and disparately discriminate against these clients must not be allowed to determine what constitutes a "private home," especially when the outcome of applying those factors will likely result in an unjustified judicial classification of "institutionalization" of these most severely disabled.

Though the *Welding* factors may have been appropriate in deciding that particular case, the individual with more profound disabilities will find those same factors prove to be blatantly discriminatory against the most severely developmentally disabled.

The court of appeals in deciding this case narrowly considered each of the *Welding* factors. The first factor the court of appeals considered is "**whether the client lived in the living unit as his or her private home before beginning to receive the services.**" (App. A at A12-A13). This factor, however, does not consider those clients that have left institutions and moved into the community or those who have chosen to move from one residence to another. Indeed, many of the clients served by Incor moved out of institutions or nursing homes after obtaining agreements for in-home services to be provided by Incor or other provider agencies. Given the length of, and circumstances surrounding their institutionalization, returning to their pre-institutional residences was not an option for most. Additionally, if a potential client desires to move into another home and contract for Incor's

services, that factor would weigh against the private status of the client's new residence. Inexplicably, this factor unfairly restricts the client's freedom of moving from one residence to another without risking that the new residence will later be adjudged as "non-private," and subject the aged or infirm to exposure for back overtime wage claims and liquidated damages. Thus, the first *Welding* factor unreasonably weighs against the aged or infirm moving out of an institution or away from their family home in the private home analysis.

The second factor is "who owns the living unit." (App. A at A13-A14). In this case, most of Incor's developmentally disabled clients were not fortunate enough to live in a family owned or occupied residence. All of Incor's clients, and/or their guardians, rented their residence by signing leases with a landlord. Therefore, since the ultimate test of a "private home" is control, if a residence is leased by the client or guardian that fact should clearly weigh in favor of the residence being a "private home." The fact that the client and/or guardian determine where the client is going to live and execute the proper agreements to accomplish that should demonstrate absolute "control" of the residence. Taking into consideration "ownership," as opposed to "the right to control," unfairly discriminates against those individuals who were neither able to "own" their own home nor have their residence given to them.

The third factor considers "who manages and maintains the residence." (App. A at A15-A16). Of

course, in order to qualify for the exemption the individual must be unable to care for themselves, so it is axiomic that the recipients will need assistance with their residences. The court of appeals decision in this case wholly ignores the client and/or guardian's right to contract for that assistance from providers like Incor, and essentially insists that the individual residence be managed on a daily basis by a family member.

Due to the severity of the client's disabilities at issue in this case, these clients will *always* have to have someone else manage and maintain their residence. If it is not a family member who is managing and maintaining the home daily does that make the home any less "private" for the client? The Service Agreement which instructs the service provider to do what a family member may not be willing or able to do on a daily basis for the client should be given the foremost consideration in determining the client or guardian's control over the residence. Important to this case, the Service Agreements confirm the client's and/or guardian's ultimate responsibility with respect to home management yet the Tenth Circuit failed to give any consideration to the Service Agreements Incor has with its clients.

Thus, under the third factor, if the aged or infirm do not have a readily available family member able to manage the residence, their home is more likely non-private. This factor discriminates against those individuals with the most profound disabilities and handicaps that are unable to fully manage the residence. Sadly, as the

population ages in this country, fewer and fewer aged and infirm have family members willing and able to care for their daily needs.

The fourth factor considers "**whether the client would be allowed to live in the unit if the client were not contracting with the provider for services.**" (App. A at A16-A17). The court of appeals application of this factor is particularly troublesome to this case. If the client or guardian executes a lease agreement on a residence, of which Incor is not a party, why wouldn't the client be able to remain in the property if Incor is no longer providing the client services? The court of appeals has, however, saddled Incor with the responsibility of proving that the landlords would have rented to the client absent Incor's services. (App. A at A16-A17).

This is a contradictory factor. Incor bears the burden of proving that the residences are "private homes" which is demonstrated in part by the leases executed by the clients or their guardians. Yet the court of appeals suggests that Incor, who is not a party to the lease agreements and has no control over the leases, consult the landlords to affirmatively prove that the clients could have rented the residence whether they obtain services through a provider or not. (App. A at A16-A17).

Factor number five is most confusing and compares the "**relative difference in the cost/value of the services provided and the total cost of maintaining the living unit (including government subsidies).**" (App. A at A18-A20). This factor

compares the cost of the services the client receives against the cost of maintaining the home. If the cost of services is a "substantial portion" of the total cost of maintaining the living unit, it will weigh against the residence being a private home. Clearly, aged or infirm with more profound disabilities will require a greater level of care and the costs of those services will be exponentially greater. However, the costs of the services provided to those most profoundly disabled individuals has no bearing upon the parent or guardian's right to control the home. Indeed, the clients with more profound disabilities, who require more services, will always have a higher cost of care than someone who only requires care a few hours a day. Those clients who require care only a few hours a day will never need to use the exemption to the FLSA because it will be unlikely any one care provider will work in the home more than forty hours in a given week. Likewise, if a client with profound disabilities chooses to rent an affordable residence or live with a roommate to save on costs, this factor will again categorize the home as not being private.

This factor clearly discriminates against individuals with more profound disabilities due to the higher costs of their care. Further, the cost/value factor bears no discernable relationship to the control of the residence.

And finally, the sixth factor looks at "whether the service provider uses any part of the residence for the provider's own business purposes." (App. A at A20). Again, due to the level

of disabilities and care required of the clients in this case, there must be proper documentation and recordation of client's treatment and training. This requires paperwork to be filled out by the provider for the care of the client. All of the paperwork in the client's residence related to their care (i.e., medical records, progress notes, activity logs) and was kept in their home with their permission. Indeed, those necessary client records were the property of the individuals and would remain with the client should the client move or change providers. Whether or not the service provider keeps any required paperwork or uses any part of the home to complete that paperwork can be addressed and controlled through the Service Agreement by the client and/or their guardian.

The six "private home" factors as set out in *Welding*, discriminate against the more profoundly developmentally disabled because they fail to account for the individual needs and requirements of caring for such individuals. Severely disabled individuals will never reside in a "private home," and in turn may never utilize the very exemption designed to assist them in obtaining such services. In categorizing these aged or infirm individuals in this way, the Tenth Circuit is relegating the severely disabled as being perpetually categorized as institutionalized, no matter where they reside. Such perpetual institutionalization, this Supreme Court has held, is discrimination. *See Olmstead v. L.C.*, 527 U.S. 581, 119 S. Ct. 2176, 144 L.Ed. 2d 540 (1999). Most significantly, as discussed in depth above, under the cost/value factor, the more

services the client requires, the more funding that will be required to care for the client. Thus, the purpose of the exemption is undermined by excluding the home as "private" due to the fact that the resident's cost of care will be a "substantial portion of the total cost of maintaining the living unit." *Welding*, 353 F.3d at 1220. Likewise, the management and maintenance of the residence factor (factor three) lends itself to always finding that the more severely disabled the client, the more likely the home will not be private in instances where a family member is not ready, willing and able to manage the residence on a daily basis. Clients such as Incor's cannot personally maintain their homes and that is precisely the purpose of providing for the highest level of care and training for these individuals. Absent this level of care, the only option is institutionalization or sub-standard services.

Under the current factors applied by the Tenth Circuit, the only clients that will be able to meet the "private home" standard will be ones that are living in a home that they personally owned prior to needing Incor's services. Someone with such severe disabilities as the clients in this case will not have the ability to own their own home. However, even if the home was owned by the client, or if the client was living with a family member, application of the other *Welding* factors could easily strip that residence of its private nature due to application of the other factors. Discrimination against the most severely disabled is surely not what Congress had in mind when enacting the

exemption for "Companionship Services" under the FLSA or in enacting the ADA.

In sum, these issues present questions that need to be finally settled by this Court, warranting granting this petition for writ of certiorari.

3) **The United States Court of Appeals for the Tenth Circuit has interpreted a federal regulation in a way that frustrates the purpose of relevant decisions of the United States Supreme Court.**

The court of appeal's decision at issue in this case frustrates the purpose of this Court's recent decision in *Long Island Care at Home, Ltd. v. Coke*, 127 S.Ct. 2339 (2007), and the ability of third party employers to use and rely upon the Companionship Services exception to the FLSA. In *Coke*, this court upheld the validity of the third party exemption contained in 29 C.F.R. § 552.109(a). The Tenth Circuit's decision in this case, and application of the *Welding* factors, has made the burden of demonstrating the "private home" status under the exemption a hyper-technical gauntlet. The expansion of the exemption to third party employers will not be available under the Tenth Circuit's current analysis, or it will be so uncertain as to prevent employers from utilizing it, thus effectively rendering it useless. The court of appeals in this case has in effect invalidated the very regulation that this Court sought to expand in *Coke*.

The costs of not allowing this exception to be used by third party employers to care for a significant population, include; 1) increased cost of care, putting a financial burden on the aged, infirm, their families, state and federal government, and/or the service provider, 2) reduction in services which will risk improper care of the clients, 3) or institutionalization.

The problem created by the court of appeal's effectual invalidation of § 552.109(a) reaches far "beyond the academic or episodic." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955). Provider agencies inability to use this exception will have a dramatic impact on home health care costs throughout the Tenth Circuit, and it will force largely government-funded agencies to restructure their business operations in ways that will seriously harm both the care recipients and the employees. Employers will limit the number of hours their employees work each week, affecting the overall care that the client receives and the amount of pay and benefits the employee receives.

Further, the added strain on governmental budgets due to employers not utilizing this exception will upset the home health care balance of the desire to give patients an alternative to institutionalization yet still provide an affordable and safe option for health care. Many disabled will be forced into institutionalization if third party employers can no longer assure adequate and safe services at an affordable cost.

Due to the uncertainty in the application of the *Welding* factors, and this Court's recent

pronouncement of the validity of the third party employer exception, final interpretation of this issue warrants granting this petition for writ of certiorari.

CONCLUSION

The petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit should be granted.

Respectfully Submitted,

Adam Scott Weintraub
Counsel of Record
Terry S. O'Donnell
Savage, O'Donnell, Affeldt,
Weintraub & Johnson
110 W. 7th Street, Suite 1010
Tulsa, OK 74119
(918) 599-8400
Attorneys for Petitioners

Dated: August 28, 2008

103

(2)

Supreme Court, U.S.
FILED

08-278 AUG 28 2008

OFFICE OF THE CLERK
William K. Suter, Clerk

No.

IN THE

Supreme Court of the United States

INCOR, SHELTERED WORK ACTIVITY PROGRAM, INC., ET AL.,

Petitioners,

vs.

KENT W. FOWLER, ET. AL., INDIVIDUALLY AND STANDING IN THE STEAD OF OTHER PERSONS SIMILARLY SITUATED

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI APPENDIX

Adam Scott Weintraub
Counsel of Record
Terry S. O'Donnell
Savage, O'Donnell, Affeldt,
Weintraub & Johnson
110 W. 7th Street, Suite 1010
Tulsa, OK 74119
(918) 599-8400
Attorneys for Petitioners

TABLE OF CONTENTS

APPENDIX A ..... PAGES A1-A54
ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

APPENDIX B ..... PAGES B1-B190
JUDGMENT AND FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

APPENDIX C..... PAGES C1-C2
ORDER DENYING PETITION FOR REHEARING UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

APPENDIX D ..... PAGES D1-D8
AMERICANS WITH DISABILITIES ACT OF 1990, 42 U.S.C. § 12101, §§ 12131-12134

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

KENT W. FOWLER; CODY FOWLER; MICHAEL LEACH; LARRY BURRIS; FRANCES WOODS; ROSEOLA THORNBURG; KATHERINE CARROLL; BETTIE BURNETT; LISA SMITH; ALICE SMITH; LESA HORNEY; CHRISTINE LANE-HUCKABAY; KENYA WASHINGTON; YOLANDA WHITE; ANGELA MCVAY; WAKEETHA ATKESON; ANGIE MILLER; RUBY MCGEE; CARMEN KIRKLAND; ANNTONETT TAYLOR; DELORIS WILSON; TIA SALLIS; SHERRY SALLIS; BRUCE MCCARTHY; NICOLE PIERCE; CYNTHIA WHITEFIELD; JORETTA TRUITT; JUDY BLACKMER; LAJOYA DAVIS; LECEIF SPRING; MISTY GRAHAM; SONYA JULY; STEPHANIE NEWMAN; individually and standing in the stead of other persons similarly situated,

Plaintiffs-Appellants,

v.

FILED
United States Court of Appeals
Tenth Circuit

May 12, 2008

Elisabeth A. Shumaker
Clerk of Court

No. 05-7113

INCOR; SHELTERED WORK ACTIVITY PROGRAM, INC., d/b/a INCOR; EDWARD BREEN; BETSY BREEN,

Defendants-Appellees.

Appeal from the United States District Court
For the Eastern District of Oklahoma
(D.C. No. 6:03 – CV – 00321 – RAW)

ORDER AND JUDGMENT*

Before **HENRY**, Chief Judge, **ANDERSON** and **MCCONNELL**, Circuit Judges.

Appellee Incor is in the business of providing services to developmentally disabled adults in

---

* After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. See Fed. R.App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R.App. P. 32.1 and 10th Cir. R. 32.1.

northeastern Oklahoma, including operation of a residential program. Its residential-program employees work as habilitation training specialists and/or house managers, responsible for round-the-clock care of Incor's clients, most of whom have physical disabilities and function at mental levels ranging from a one-year to six-year-old. The employees sued for unpaid wages under the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (FLSA). Prior to trial, the district court entered summary judgment for Incor that denied liquidated damages and applied a two-year statute of limitations. Following a bench trial, the court made findings of fact and conclusions of law, and entered judgment in favor of Incor and against the employees on all of their claims.[2] We affirm the court's summary

---

[2] The trial court ruled that Edward Breen and Betsy Breen,

judgment order applying a two-year statute of limitations to the employees' claims. However, we vacate the court's findings of fact and conclusions of law, reverse its order on summary judgment denying liquidated damages, and remand the case for further proceedings consistent with this order and judgment.

I. PRIVATE HOMES

A. The Statutory And Regulatory Framework

The employees' first claim was for overtime wages on the theory that they were not providing companionship services in private homes. The FLSA requires payment of overtime compensation for certain employees who work more than forty

---

the owners of Incor, are employers under 29 U.S.C. § 203(d) and thus jointly and severally liable for any judgment. The Breens do not cross-appeal from the ruling and are bound by it.

hours per week. 29 U.S.C. § 207. At the same time, 29 U.S.C. § 213(a)(15) provides an exemption for overtime to, inter alia, "any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves[.]" A related Department of Labor (DOL) regulation provides that "domestic service employment" means "services of a household nature performed by an employee in or about a private home ... of the person by whom he or she is employed." 29 C.F.R. § 552.3.[3]

---

[3] In *Long Island Care at Home, Ltd. v. Coke*, 127 S.Ct. 2339, (2007), the Supreme Court upheld the validity of § 552.109(a), which extends the application of the companionship services exemption to workers employed by a third party such as Incor. *See also Welding v. Bios Corp.*, 353 F.3d 1214, 1217 n. 3 (10th Cir. 2004) ("The exemption can apply even when the domestic service employee is actually employed by a service agency[.]"); *Johnston v. Volunteers of Am., Inc.*, 213 F.3d 559, 562 (10th Cir. 2000) (same). In the interest of judicial

B. The Burden Of Proof

The Supreme Court has held that FLSA "exemptions are to be narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit." *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960). Further, "the general rule [is] that the application of an exemption under the [FLSA] is a matter of affirmative defense on which the employer has the burden of proof." *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974); *see also Sanders v. Elephant Butte Irrigation Dist. of N.M.*, 112 F.3d 468, 470 (10th Cir. 1997). In light of these principles, we have held that an employer

---

economy, we delayed our review of this case pending the decision in *Long Island Care*.

must prove an exemption by "clear and affirmative evidence." *Aaron v. City of Wichita*, 54 F.3d 652, 657 (10th Cir. 1995).

Our use of "clear and affirmative evidence," *id.*, has lead to confusion whether this in fact means clear and convincing evidence – a burden beyond the preponderance of evidence standard traditionally applied in civil cases. This is not the case; instead, clear and affirmative evidence is simply an "invocation of the familiar principle of statutory interpretation that exemptions from a statute that creates remedies that should be construed narrowly," *Yi v. Sterling Collision Centers, Inc.*, 480 F.3d 505, 508 (7th Cir. 2007), and "also that the burden of proof is on the [employer], since entitlement to an exemption is an affirmative defense." *Id.* at 507. "[A] silent or

ambiguous record" is not affirmative evidence. *United States v. Bush*, 405 F.3d 909, 921 (10th Cir. 2005).

C. The Standard Of Review

In determining whether an exemption to the FLSA applies, we review the trial court's factual determinations for clear error and its legal conclusions de novo. *Sanders*, 112 F.3d at 470. Specifically, the key factors described in *Welding v. Bios Corp.*, 353 F.3d 1214 (10th Cir. 2004), used to determine whether a residence is a private home, are questions of fact reviewed under a clearly erroneous standard. *Sanders*, 112 F.3d at 470. However, the question of whether a particular living unit is a private home and therefore excluded from overtime, is a question of law reviewed de novo. *Id.* Further, "[w]hether the district court

failed to consider or accord proper weight or significance to relevant evidence are questions of law [this court] review[s] de novo." *Flying J Inc. v. Comdata Network, Inc.*, 405 F.3d 821, 829 (10th Cir. 2005) (quotation marks and citations omitted).

Despite our disapproval of the practice,[4] the trial court essentially adopted verbatim the proposed findings of fact and conclusions of law submitted by Incor. *Compare* "Defendant's Findings of Fact and Conclusions of Law," Aplt. App., Vol. X at 5414-86, *with* "Findings of Fact and Conclusions of Law," *id.* at 5487-5584. But we need not decide whether the findings of fact are clearly

---

[4] We disapprove of the practice for many reasons, including that "[t]he court's wholesale adoption of one party's proposed findings of fact and conclusions of law provides little aid on appellate review, particularly in the likely event that the adopted submission takes an adversarial stance." *Flying J Inc. v. Comdata Network, Inc.*, 405 F.3d 821, 830 (10th Cir. 2005) (citation omitted).

erroneous, because the findings and conclusions misstate the law and fail to consider or give proper weight to relevant evidence, which are legal questions we review de novo. On remand, we direct the court to make its own findings of fact based on its review of the evidence and to apply the law set forth in this order and judgment.

D. Analysis

In determining whether companionship services are provided in a private home, "the object of evaluation is the living unit of the person receiving the services, i.e., the client. The client's living unit consists of the client's bedroom and the common areas to which the client has access.[5] The

---

[5] In addition to a traditional single-family home, Department of Labor regulations provide that "[a] separate and distinct dwelling maintained by an individual or a family in an apartment house, condominium or hotel may constitute a private home." 29 C.F.R. § 552.101(a).

court must evaluate each living unit separately[.]" *Welding*, 353 F.3d at 1218.

The key inquiries to determine whether the living unit is a private home are "who has ultimate management control of the living unit and whether the living unit is maintained primarily to facilitate the provision of assistive services." *Id.* at 1219. There are several factors used to answer these key inquiries, including: (1) did the client live in the living unit as his or her private home before receiving services; (2) who owns the living unit; (3) who manages and maintains the residence; (4) would the client be allowed to live in the living unit if he or she was not receiving services; (5) the relative difference in the cost/value of the services provided and the total cost of maintaining the living unit; and (6) whether the service provider

uses any part of the living unit for its own business purposes. *Id.* at 1219-20.

"The first factor is whether the client lived in the living unit as his or her private home before beginning to receive the services." *Id.* As *Welding* teaches, having lived in the living unit as a private home prior to the onset of services is "a powerful indicator that the residence is a private home." *Id.* There is the "easy-to-spot private home . . . where the families lived in their homes prior to and independent of their receipt of companion services," *id.* (citation and quotation marks omitted), compared to non-private homes where the clients have never lived without the assistance of a service provider. In its proposed conclusions of law, Incor tried to explain away the lack of any evidence on this factor by representing that "[m]ore importantly

... the uncontradicted evidence at trial was that Incor's clients were always allowed to freely move into different residences and with roommates, if they so choose." Aplt. App., Vol. X at 5573. Setting aside the fact that this sweeping conclusion lacks record support, it has nothing to do with whether the client lived in the living unit as *his or her private home* before beginning to receive services.

"The second factor is who owns the living unit. Ownership is significant because it evidences control." *Welding*, 353 F.3d at 1219. In situations where the living units are owned by a third party, "that is a more ambiguous indicator, and the court must look to see who leases the unit from the third party." *Id.* Contrary to Incor's finding that "no evidence was presented at trial that Incor had any possessory interest in, or right to, the client's

homes," Aplt. App., Vol. X at 5574, Incor was listed as the tenant/lessee or responsible party on four leases (2200 Turner Street, 901 Erie, 200 East Monroe, and 505 North G Street), which "is some indication that it is not a private home." *Welding*, 353 F.3d at 1219. And although it is true that the clients signed or made their marks on the leases for the remaining living units, which "is some indication that [they are] private home[s]," *id.*, that is not the end of the inquiry. Instead, "residences [ ]managed by [habilitation training specialists] . . . do not fit plainly and unmistakably into the ordinary connotation of the words 'private home' ... notwithstanding the fact that the lease may bear the name of a developmentally disabled person." *Johnston v. Volunteers of Am., Inc.*, 213 F.3d 559, 565 (10th Cir. 2000).

"The third factor is who manages and maintains the residence. In other words, who provides the essential things that the client needs to live there, such as paying the mortgage or rent, paying for gas, electricity, and water, providing clean linens and clothes, and providing food?" *Welding*, 353 F.3d at 1219. "If many of the essentials of daily living are provided for by the client or the client's family, that weighs strongly in favor of it being a private home. If they are provided for by the service provider, that weighs strongly in favor of it not being a private home." *Id.* at 1220. Incor's findings failed to consider "who provides the essential things that the client needs to live there [.]" Instead, it offered that because the clients and/or their guardians participated in developing individual training plans and had

service agreements with Incor, they had management control. This distorts *Welding*, which states that the object of evaluation is the living unit – not ancillary agreements.

"The fourth factor is whether the client would be allowed to live in the unit if the client were not contracting with the provider for services." *Id.* at 1220. As a matter of common sense, "[i]f the client would be allowed to live in the unit without contracting for the services, that weighs in favor of it being a private home. If the client would not be allowed to live in the unit without contracting for the provider's services, that weighs in favor of it not being a private home." *Id.* Contrary to *Welding*, Incor re-framed the inquiry as the "[p]otential [c]ontinuity of [o]ne [c]lient in the [r]esidence," Aplt. App., Vol. X at 5575, and reasoned that

because it was not the landlord, a client would be allowed to live in the unit even if he or she fired Incor. This ignores the fact that there was no evidence that any landlord would have rented to any of these clients unless they had a service provider. In the absence of such evidence, Incor could only speculate that "there is no reason to believe a client could not remain in their home in the event Incor's services were terminated." *Id.* The error was compounded by relying on 42 U.S .C. § 3604(f)(1)(A) for the conclusion that a landlord could not terminate the lease and/or refuse tc rent to disabled persons. The statute, however, applies only to properties owned, operated, or financed by the federal government. *See id.* § 3603(a)(1)(A)-(D).

"The fifth factor is the relative difference in the cost/value of the services provided and the total cost of maintaining the living unit (including government subsidies)." *Welding*, 353 F.3d at 1220. As *Welding* explains, this factor "relate[s] to the purpose for which the living unit is primarily maintained." *Id.* "If the cost/value of the services is incidental to the other living expenses, that weighs in favor of it being a private home. If the cost/value of the services is a substantial portion of the total cost of maintaining the living unit, that weighs in favor of it not being a private home." *Id.* Incor tortured the fifth factor beyond recognition. Because its analysis is not easily summarized, we quote it in full:

> [T]he HTS services were paid in full by the DHS (i.e., the client paid nothing for the services). Conversely,

> the client was responsible to 'pay up to 90% of the income, not to exceed $14.00 per day' to cover the expenses of maintaining the living unit (i.e., rent, insurance, utilities, groceries, etc.). Thus, the cost of the HTS services to the client was not any portion of the total cost to the client for maintaining his or her home.

Aplt. App., Vol. X at 5575. An example of how the fifth *Welding* factor should be applied is Edward Breen testified for one client for one year at 505 Judy Lane, daily living expenses were $47,000, habilitation services were $60,736, and transportation costs were $3,700. The trial court should then compare the relative difference between $60,736 (the cost/value of the habilitation services) against $110,436 (the total cost of maintaining the living unit). Because $60,736 "is a substantial portion of the total cost of maintaining

the living unit, that weighs in favor of it not being a private home." *Welding*, 353 F.3d at 1220.

[T]he sixth [and final] factor is whether the service provider uses any part of the residence for the provider's own business purposes." *Id.* Although Incor did maintain desks, file cabinets, and store paperwork in some of the homes, its proposed findings and conclusions ignored the specific evidence with regard to specific residences.

Although the district court purported to conduct the home-by-home analysis required by *Welding*, in some respects it misstated the law and failed to apply the key factors to the relevant evidence. For example, instead of inquiring whether Incor's clients had previously lived in their current homes, as *Welding* prescribes, 353 F.3d at 1219, the court pointed instead to what it called

"uncontradicted evidence at trial ... that Incor's clients were always allowed to freely move into different residences and with roommates, if they so choose." Aplt. App., Vol. X at 5573. We have some doubts that the record supports this reading, but more importantly, it is a different question than that framed by our precedents. Similarly, the court found that Incor had no possessory interest in any of the units, *id.* at 5574, but did not explain how this analysis applied to the four units (2200 Turner Street, 901 Erie, 200 East Monroe, and 505 North G Street) for which Incor was listed as the tenant/lessee or responsible party. For a third example, *Welding* requires that the court determine whether the value of the services provided is a "substantial portion" of the total cost of maintaining the living unit. 353 F.3d at 1220.

The district court, instead, looked to the proportion of total cost borne by the client, as opposed to the DHS. Aplt. App., Vol. X at 5575.

We therefore remand the case for new findings of fact in light of the law explained above. We also remind the court that Incor bears the burden of proving that these are private homes by a preponderance of the evidence.

II. GENERAL HOUSEHOLD WORK

A. The Statutory And Regulatory Framework

The employees' second claim was for overtime compensation based on the theory that even if they were working in private homes, they spent more than twenty percent of the total hours worked each week performing general household tasks. As a general rule, the FLSA requires payment of overtime compensation for employees

who work more than forty hours per week. *See* 29 U.S.C. § 207. However, it provides an exemption to "any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves[.]" 29 U.S.C. § 213(a)(15). In turn, the DOL defines "companionship services" as

> those services which provide fellowship, care, and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs. Such services may include household work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services. They may also include the performance of general household work: *Provided, however*, [t]hat such work is incidental, *i.e.*, does not exceed 20 percent of the total weekly hours worked.

29 C.F.R. § 552.6.

Section 552.6 distinguishes household work related to the care of a client, which includes meal preparation, bed making, laundry, and other similar services, from general household work, which is unrelated to the care of the client. In *McCune v. Oregon Senior Services Division*, 643 F. Supp. 1444, 1450 (D.Or. 1986), *aff'd*, 894 F.2d 1107 (9th Cir. 1990), (interpreting Section 552.6 to determine whether the minimum wage requirement of 29 U.S.C. § 206 apply) the court set forth the general test as

> [d]usting or cleaning [the client's bedroom or living room] appears to be routine, general household work, rather than work related to the individual. Cleaning a spill by the client in either room, by contrast, would be non-routine care more related to the individual than the

> general household, and would not be included in the twenty percent figure.
>
> The regulation defines care related to the individual as including meal preparation, bed making, washing of clothes and 'other similar services.' These similar services would presumably include other types of personal care, such as bathing, feeding, or cleaning spills.

Care related to the individual has been expanded to include more frequent vacuuming and dusting for a client with allergies, mopping and sweeping for clients who crawl on the floor, and habilitation training, which often includes training the client to do housework, cooking, and attending to personal hygiene. *See Terwilliger v. Home of Hope, Inc.*, 42 F. Supp. 2d 1231, 1241-42, 1253 (N.D. Okla. 1999).

B. The Burden Of Proof

For the reasons explained in Section I, B, *supra*, Incor bears the burden of proving its entitlement to this exemption under a remedial statute that must be narrowly construed. The district court, however, imposed the burden of proof on the employees. The court based its conclusion on language in *Terwilliger*, 42 F.Supp.2d at 1252, that calls the "'20% rule' . . . an exception to the companionship services exemption." Aplt. App., Vol. X at 5578 n. 17. This, however, does not shift the burden of proof. There is no "exception to an exemption" in 29 C.F.R. § 552.6; instead, the exemption is the "companionship services" exemption in 29 U.S.C. § 213(a)(15). Further, even if § 552.6 was an exception, the employer would still bear the burden of proof. *See, e.g., Acton v.*

City of Columbia, 436 F.3d 969, 976 (8th Cir. 2006) (holding that "[t]he burden is on the employer to establish that the remuneration in question falls under an exception [to the FLSA];" *Johnson v. City of Columbia*, S. C., 949 F.2d 127, 129-30 (4th Cir. 1991) (holding that "[e]xemptions from or exceptions to [the FLSA's] requirements are to be narrowly construed against the employer asserting them[,] and [s]ince the [employer] seeks to come within the . . . exceptions, the burden is on the [employer] to show that it is entitled to the benefits of those exceptions") (quotation omitted); *Donovan v. Brown Equip. & Serv. Tools, Inc.*, 666 F.2d 148, 153 (5th Cir. 1982) (same).

The district court also ruled, in the alternative, that it would rule in favor of Incor "even if [it] were to place the burden of proof

regarding the 20% rule on [Incor]," Aplt. App., Vol. X at 5580. We are unable to review that alternative holding on this record. The relevant facts were disputed, and the court did not separately identify which factual conclusions rested on the erroneous allocation of the burden of proof. For example, the court rejected the employees' estimates of how much time they spent on general household work because they did not "attempt[ ] to reconstruct through contemporaneous time records the amount of housework that he or she performed while serving as an HTS, whether the housework was related to the client or general in nature." *Id.* at 5537. The question, however, should have been whether Incor introduced sufficient evidence to establish that the exemption applied. The lack of contemporaneous time records could be relevant to

the ultimate conclusion (assuming that such recordkeeping was required, which appears not to have been the case), but the district court erred in basing its conclusion on a defect in the employees' case rather than on the content of the employer's evidence. The court did not explain how, on this record, it could have reached the alternative holding that the employer it would rule in favor of Incor even if the employer bore the burden of proof.

We think it better to vacate this portion of the decision and allow the district court to undertake a fresh evaluation of the case in light of the proper burden of proof.

III. TRAINING TIME

A. The Statutory And Regulatory Framework

The employees' third claim was for regular wages for time spent in training classes under the

theory that their attendance was involuntary. The FLSA obligates an employer to pay its employees for all hours worked. "Work" is not defined in the FLSA, but an employee generally must be paid for his time that is controlled and required by the employer regardless of whether it involves any mental or physical exertion. *See* 29 C.F.R. §§§ 785.1, 785.6, 785.7; *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944). To that end, the DOL has promulgated regulations regarding training, including 29 C.F.R. § 785.27, which provides:

> Attendance at lectures, meetings, training programs and similar activities need not be counted as working time if the following four criteria are met:
> (a) Attendance is outside of the employee's regular working hours;
> (b) Attendance is in fact voluntary;
> (c) The course, lecture, or meeting is not directly related to the employee's job; and

> (d) The employee does not perform any productive work during such attendance.

The regulations further provide that training is not "voluntary" if an employee's "[a]ttendance ... is ... required by the employer. It is not voluntary in fact if the employee is given to understand or led to believe that his present working conditions or the continuance of his employment would be adversely affected by nonattendance." 29 C.F.R. § 785.28.

B. The Burden Of Proof

An employer seeking to avoid application of the FLSA's general rule that work is compensable bears the burden of proving an exception. *Acton*, 436 F.3d at 976; *Johnson*, 949 F.2d at 129-30; *Donovan*, 666 F.2d at 153. For the reasons explained in Section I, B, *supra*, Incor bears the burden of proving its entitlement to this exemption

under a remedial statute that must be narrowly construed.

C. The Standard Of Review

The trial court's factual determinations are reviewed for clear error, *Sanders*, 112 F.3d at 470, but whether a given set of facts constitutes "work" under the FLSA is a question of law reviewed de novo. *Chao v. Tradesmen Int'l, Inc.*, 310 F.3d 904, 907 (6th Cir. 2002); *Birdwell v. City of Gadsden*, 970 F.2d 802, 807 (11th Cir. 1992). Further, "[w]hether the district court failed to consider or accord proper weight or significance to relevant evidence are questions of law [this court] review[s] de novo." *Flying J Inc.*, 405 F.3d at 829.

D. Analysis

The DOL acknowledges that "[t]he ultimate decision on interpretations of the [FLSA] are made

by the courts. 29 C.F.R. § 785.2. Nonetheless, because the agency "must determine in the first instance the positions [it] will take in the enforcement of [the FLSA]," the regulations "seek to inform the public of [the] positions" that it will take. *Id.* "[They] should thus provide a 'practical guide for employers and employees as to how the office representing the public interest in its enforcement will seek to apply [the FLSA].'" *Id.* (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 138 (1944)). Because 29 C.F.R. §§ 785.27 and 785.28 are interpretative regulations, the courts should defer to them only to the extent they have the power to persuade. *Skidmore*, 323 U.S. at 138. Similarly, the courts are not bound by informal administrative opinions; instead, "[i]nterpretations such as those in opinion letters – like

interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000); *see also Rodriguez v. Whiting Farms, Inc.*, 360 F.3d 1180, 1189 (10th Cir. 2004).

Although the trial court erroneously afforded *Chevron* deference[6] to § 785.28 and an opinion letter concerning the child-care industry, we find these sources persuasive under *Skidmore*, and therefore employ them in our analysis. Section 785.28 provides that training is not "voluntary" if an employee's attendance . . . is . . . required by the employer. It is not voluntary in fact if the

---

[6] *Chevron* deference refers to *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

employee is given to understand or led to believe that his present working conditions or the continuance of his employment would be adversely affected by nonattendance." And the opinion letter states in relevant part that

> where a State requires employers to provide training as a condition of the employer's license to remain open for business-e.g ., a day care center operator's license is conditional on all employees receiving a fixed number of hours of child care training each year. As the operator would typically require employees to attend such training, it would not be voluntary, and this criterion would not be met.

Opinion Letter from Dept. of Labor, Wage and Hour Div. (Sept. 9, 1996), 1996 WL 1031798.

Despite its length, the district court's analysis of this point, which was adopted word-for-word from the employer's proposed findings, does not relate the evidence to the legal standard. The

evidence, as we discern it from the record, consisted of testimony from employees and Betsy Breen, and some documentary evidence. The employees testified that any employee who missed training faced removal from the work schedule or being fired. Ms. Breen testified that the consequences of the failure to attend training varied "depend[ing] on what the training was and how many times they missed it. If it was a first training and they'd missed it, then they just continued on their schedule. If it was a repeated failure to attend a required training, then they might be removed from the schedule." Aplt. App., Vol. X at 5608. The documentary evidence included a letter from Incor to an employee stating that she was "taken off the schedule due to not having [a required course]" and that she could only get back on the schedule when

she "received a certificate." *Id.*, Vol. XVI at 8484. The district court does not explain how this evidence supports a conclusion that the training was voluntary, for purposes of § 785.28. We therefore vacate this portion of the decision and remand to the district court to evaluate the evidence in light of the regulatory criteria.

IV. LIQUIDATED DAMAGES AND STATUTE OF LIMITATIONS

A. The Statutory And Legal Framework

The employees argue that the trial court erred in granting Incor's motion for summary judgment as to liquidated damages and the application of a two-year statute of limitations to their claims. Because the court applied the wrong definition of willfulness and misapplied the burden of proof as to liquidated damages, we reverse and

remand the liquidated damages claim for further proceedings consistent with this order and judgment. We affirm the court's order applying a two-year statute of limitations.

Although a standard of willfulness applies to both liquidated damages and the statute of limitations under the FLSA, the definitions and burdens of proof differ for each. Ordinarily, an employer who violates FLSA is liable for both unpaid wages and an additional equal amount as liquidated damages. 29 U.S.C. § 216(b). To avoid such damages, the employer must show "to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA]." 29 U.S.C. § 260. Good faith is a subjective test that

requires "the employer have an honest intention to ascertain and follow the dictates of [the FLSA]." *Dep't of Labor v. City of Sapulpa*, 30 F.3d 1285, 1289 (10th Cir. 1994) (quotation omitted). Reasonableness "imposes an objective standard by which to judge the employer's behavior." *Id.* Only in those instances where the court finds that the employer meets this burden, it may, "in its sound discretion," deny liquidated damages. *Pabst v. Okla. Gas & Elec. Co.*, 228 F.3d 1128, 1136 (10th Cir. 2000); *see also City of Sapulpa*, 30 F.3d at 1289 (holding that even if the trial court finds that the employer acted in good faith and reasonably, it may still award liquidated damages).

A two-year statute of limitations applies to an action for unpaid wages under the FLSA, except where an employer acts willfully, in which case, a

three-year period applies. 29 U.S.C. § 255(a). The employee bears the burden of proving that the employer acted willfully. *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 135 (1988); *see also Gilligan v. City of Emporia*, 986 F.2d 410, 413 (10th Cir. 1993). For purposes of the statute of limitations, "willful" means "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by [the FLSA]." *McLaughlin*, 486 U.S. at 133; *see also Reich v. Monfort, Inc.*, 144 F.3d 1329, 1334 (10th Cir. 1998).

B. The Burden Of Proof

Summary judgment is proper if the pleadings, discovery materials, and any affidavits show that there is no genuine issue as to any material fact, and the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56(c).

The district court must view the evidence and draw all reasonable inferences therefrom in the light most favorable to the nonmoving party. *In re Wal-Mart Stores, Inc.*, 395 F.3d 1177, 1189 (10th Cir. 2005). As part of this function the court may not make credibility determinations or weigh the evidence, and must disregard all evidence favorable to the moving party that the trier of fact is not required to believe. *Gossett v. Oklahoma*, 245 F.3d 1172, 1175 (10th Cir. 2001).

Summary judgment "necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Therefore, a party opposing summary judgment who does not bear the burden of proof at trial, is not required to come forward with evidence to

defeat summary judgment. On the other hand, where the nonmoving party bears the burden of proof at trial, he cannot rely on his pleadings to defeat summary judgment; instead, he must come forward with evidence sufficient to create a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1 986). Under either scenario, the moving party must demonstrate its entitlement to judgment as a matter of law.

C. The Standard Of Review

"We review the district court's grant or denial of summary judgment de novo." *Gilligan*, 986 F.2d at 412. Applying the same legal standard as the district court and viewing the evidence in the light most favorable to the party opposing the motion, "[i]f there is no genuine issue as to any material fact and the movant is entitled to

judgment as a matter of law, summary judgment is appropriate." *Id.* (quoting Rule 56(c)).

D. The Evidence On Summary Judgment

1. Incor's Evidence

a. Edward Breen's Affidavit

Edward Breen attended a conference in Oklahoma in 1993 at which Joni Fritz, the executive director of the American Network of Community Options and Resources (ANCOR), was invited to speak. According to Mr. Breen, Ms. Fritz told the group that the companionship services exemption "would apply to HTS services provided in the homes of the clients." Aplt. App., Vol. II at 1156-57. At or about the same time, Mr. Breen heard that another Oklahoma service provider, BIOS, had received confirmation from the DOL that HTS services "provided in the clients' homes

was [sic] exempt from the FLSA overtime requirements." *Id.* at 1157. This news prompted him to contact the DOL, at which time he spoke to Steven Voss, who told him that "the [DOL] was treating HTS services as 'companions' under the FLSA and that HTS services were exempt from overtime requirement." *Id.*

In April 1994, the Oklahoma Department of Human Services, Developmental Disabilities Services Division (DDSD) sponsored a conference where Ms. Fritz was again invited to speak. "Once again, Ms. Fritz advised the service providers to utilize the companion exemption with respect to HTS services provided in the homes of the clients." *Id.* Mr. Breen revised Incor's HTS job description in 1995, to incorporate the companionship exemption. *Id.* at 1158.

b. Joni Fritz's Affidavit

Joni Fritz was the executive director of ANCOR from 1976 through 1999. ANCOR is a "national organization whose purpose is to provide information and advice to organizations that support people with mental retardation and other developmental disabilities." *Id.*, Vol. III at 1354. She received a letter from the DOL, "which informed us for the first time about the Section 13(a)(15) exemption for employees who provide 'companionship services.'" *Id.*

In 1993, in response to the closure of a state mental institution, Ms. Fritz was invited to speak at a conference in Oklahoma attended by Edward Breen, where she told the group that the

companionship exemption "would apply to habilitation training services provided that those services were performed in the homes owned or leased by people with developmental disabilities who required support." *Id.* at 1355. In April 1994, Ms. Fritz returned to Oklahoma for another conference, which was again attended by Mr. Breen. Once again, she told the group that the exemption applied and "it was [her] impression that the State of Oklahoma officials were endorsing the use of the companionship exemption in order to provide better and more consistent services to people with developmental disabilities while reducing the state's operating costs." *Id.*

c. The BIOS Form

Incor provided two pages from a 1991-93 DOL investigation of BIOS, a service provider in

Oklahoma, titled "WHISARD Compliance Action Report." *Id.* at 1358. In the conclusions and recommendations section it states that it conducted an office audit for BIOS, which is under contract with the state to provide care for clients released from a state institution, and "13A15 Companion Services Applicable." *Id.* at 1359.

d. Incor Memorandum

A June 28, 1993, memorandum from Edward Breen to Incor's employees memorializes his telephone conversation with DOL employee Steven Voss. In response to the employees' questions about overtime, Mr. Breen contacted the DOL, and Mr. Voss allegedly told him the DOL "is treating the HTS category under the heading of Companion." *Id.* at 1361.

e. John Rowe's Affidavit

John Rowe worked as a case management supervisor for Oklahoma from 1983 through 1994. He attended the two conferences where Joni Fritz spoke about issues "affecting organizations that provide services to the developmentally disabled." *Id.* at 1364. He echoed that Ms. Fritz explained that "the overtime provisions of [FLSA] did not apply to individuals providing services like a [HTS] in the homes of the clients," *id.*, and that the "'companion exemption' allowed provider organizations to pay [HTSs] their regular hourly rate, regardless of the number of hours worked, when providing HTS/companion services." *Id.* Mr. Rowe opined that the state did not favor overtime pay because it would save money and provide more consistent care. Following Ms. Fritz's presentations

and her "endorsement by state officials as an authority, many provider organizations began utilizing the companion exemption in the mid to early 90's." *Id.* at 1365.

2. The Employees' Evidence

The employees presented evidence showing what Incor did not do to investigate the propriety of relying on the companionship services exemption. Among other things, the employees' evidence established: (1) Incor never read a legal opinion concerning the companionship exemption; (2) Incor never sought the advice of a lawyer about the exemption; (3) prior to being sued, Incor never questioned its decision not to pay overtime; (4) prior to being sued, Incor was aware of lawsuits against other service providers but never inquired how those companies operated; (5) Betsy Breen

never read any of the opinions in the lawsuits against other service providers; (6) Incor's auditors informed it that a lawsuit involving overtime and the exemption had gone to court; and (7) employee Kent Fowler was "told to cut shifts down to 40 hours where possible," *id.*, Vol. VIII at 4415, so Incor could "avoid a lawsuit." *Id.*, Vol. IX at 4981-82.

E. Analysis

Regarding the statute of limitations, we apply the same standard as the district court and review whether the employees' evidence, viewed in the light most favorable to them, was sufficient to create a genuine issue of material fact as to whether Incor acted willfully, i.e., whether it "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by

[the FLSA]." *McLaughlin*, 486 U.S. at 133; *see also Gilligan*, 986 F.2d at 413. We agree that the evidence failed to create a triable issue of fact and that Incor was entitled to judgment as a matter of law. Although cases involving knowledge, motive, and/or intent are not well suited to summary disposition, *Baum v. Great W. Cities, Inc.*, 703 F.2d 1197, 1210-11 (10th Cir. 1983), this does not mean that summary judgment is never proper. Instead, the evidence, viewed in the light most favorable to the employees, showed that Incor relied on the advice of industry consultants and state officials in implementing a policy that was in widespread use in Oklahoma and elsewhere. Admittedly, Incor did not consult a lawyer or investigate the lawsuits against other service providers, however this is not enough to prove recklessness. Therefore, we affirm

the court's summary judgment order for the application of a two-year statute of limitations.

As to liquidated damages, the district court erred because it applied the test of willfulness used for the statute of limitations and reasonableness and placed the burden of proof on the employees. Aplt. App., Vol. IX at 4984. Because the trial court misapplied the law, we remand the issue of liquidated damages for further proceedings consistent with this order and judgment. For Incor to obtain summary judgment, the material facts must be undisputed and establish its right to judgment as a matter of law. This means that Incor must satisfy the subjective test of good faith that requires "an honest intention to ascertain and follow the dictates of [the FLSA]," *City of Sapulpa*, 30 F.3d at 1289 (quotation omitted), and the

objective test of reasonableness. *Id.* Even if Incor meets this burden, the court may in its discretion award liquidated damages. *Id.* If the issue cannot be resolved on summary judgment, the court is directed to conduct a hearing to determine whether liquidated damages are appropriate. We also remind the court that it may not make credibility determinations on summary judgment, *Gossett*, 245 F.3d at 1175, a nd thus must disregard any credibility determinations made at trial to shore up its summary judgment order.[7]

---

[7] The trial court's findings of fact and conclusions of law comment on the credibility of Edward Breen and Betsy Breen. In particular, the court noted that even if they violated the FLSA, it "would be wholly incapable, after observing their testimony and demeanor on the witness stand, of believing such violations resulted from bad faith, malicious intent or even wilful (sic) negligence[.]" Aplt. App., Vol. X at 5498-99.

V. CONCLUSION

We **AFFIRM** the trial court's order applying a two-year statute of limitations to the employees' claims. We **VACATE** the court's findings of fact and conclusions of law and **REVERSE** its order on summary judgment denying the employees' claim for liquidated damages, and **REMAND** the case for further proceedings consistent with this order and judgment.

Entered for the Court

Michael W. McConnell
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

KENT W. FOWLER, CODY)
FOWLER, LARRY BURRIS,)
MICHAEL LEACH,)
FRANCES WOODS,)
ROSEOLA THORNBURG,)
KATHERINE CARROLL,)
BETTIE BURNETT, LISA)
SMITH, ALICE SMITH, LESA)
HORNEY, CHRISTINE)
LANE-HUCKABAY, KENYA)
WASHINGTON, YOLANDA)
WHITE, ANGELA MCVAY,)
WAKHEETHA ATKESON,)
ANGIE MILLER, RUBY)
MCGEE, CARMEN)
KIRKLAND, ANNTONETT)
TAYLOR, DELORIS)
WILSON, TIA SALLIS,)
SHERRY SALLIS, BRUCE)
MCCARTHY, NICOLE)
PIERCE, CYNTHIA)
WHITEFIELD, JORETTA)
TRUITT, JUDY BLACKMER,)
LAJOYA DAVIS, LECEIF)
SPRING, MISTY GRAHAM,)
SONYA JULY and)
STEPHANIE NEWMAN,)
Individually and)
standing in the stead of)
other persons similarly)

FILED

SEP 23, 2005

WILLIAM B. GUTHRIE
Clerk, U.S. District Court
By:_____
Deputy Clerk

situated,	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	No. CIV-03-321-WH
INCOR, SHELTERED	)	
WORK ACTIVITY	)	
PROGRAM, INC., an	)	
Oklahoma Corporation,	)	
d/b/a INCOR, EDWARD	)	
BREEN, BETSY BREEN,	)	
Defendants.	)	

JUDGMENT

In accordance with the Findings of Fact and Conclusions of Law entered contemporaneously herewith,

IT IS ORDERED, ADJUDGED and DECREED that judgment is entered in favor of the defendants and against the plaintiffs.

Dated this 23rd day of September, 2005.

/s/ Ronald A. White
RONALD A. WHITE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

KENT W. FOWLER, CODY)
FOWLER, LARRY BURRIS,)
MICHAEL LEACH,)
FRANCES WOODS,)
ROSEOLA THORNBURG,)
KATHERINE CARROLL,)
BETTIE BURNETT, LISA)
SMITH, ALICE SMITH, LESA)
HORNEY, CHRISTINE)
LANE-HUCKABAY, KENYA)
WASHINGTON, YOLANDA)
WHITE, ANGELA MCVAY,)
WAKHEETHA ATKESON,)
ANGIE MILLER, RUBY)
MCGEE, CARMEN)
KIRKLAND, ANNTONETT)
TAYLOR, DELORIS)
WILSON, TIA SALLIS,)
SHERRY SALLIS, BRUCE)
MCCARTHY, NICOLE)
PIERCE, CYNTHIA)
WHITEFIELD, JORETTA)
TRUITT, JUDY BLACKMER,)
LAJOYA DAVIS, LECEIF)
SPRING, MISTY GRAHAM,)
SONYA JULY and)
STEPHANIE NEWMAN,)
Individually and)
standing in the stead of)
other persons similarly)

FILED

SEP 23, 2005

WILLIAM B. GUTHRIE
Clerk, U.S. District Court
By:_____
Deputy Clerk

situated, Plaintiffs,	)	
vs.	)	
	)	No. CIV-03-321-WH
INCOR, SHELTERED WORK ACTIVITY PROGRAM, INC., an Oklahoma Corporation, d/b/a INCOR, EDWARD BREEN, BETSY BREEN, Defendants.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on for non-jury trial on December 6-10, 2004. The parties submitted proposed findings of fact and conclusions of law on May 2, 2005. Having considered the record as whole, the Court hereby enters its Findings of Fact and Conclusions of Law pursuant to Rule 52(a) F.R.Cv.P.

I. STATEMENT OF THE CASE

On June 4, 2003, three Plaintiffs brought this action under the Fair Labor Standards Act, ("FLSA"), 29 U.S.C. § 201 et seq, for alleged failure

to pay overtime wages and alleged failure to pay regular rate wages for time spent receiving state-mandated training consistent with the FLSA. Over the ensuing months several Plaintiffs joined this action, eventually bringing the total number of Plaintiffs to forty-nine. In addition to the Plaintiffs' claims for back overtime and training time compensation, several of the Plaintiffs brought claims for alleged Adverse Actions allegedly taken against them by the Defendants as a result of their filing/joining this action[1]. Plaintiffs are employees, or former employees, of the Defendant, Supported Work Activity Program, Inc, d/b/a Incor, Inc. ("Incor".) The primary Defendant in this action, Incor, is a non-profit corporation which provides a variety of services to developmentally disabled individuals.

Incor did not pay Plaintiffs time and one half for overtime hours from June 4, 2001 forward when the respective Plaintiffs worked in Incor's Residential Program as Habilitation Training

---

[1] See 29 U.S.C. § 215(a)(3).

Specialists ("HTS"), House Managers, or both. Kent Fowler, in addition to his time spent as an HTS, also worked as a Program Coordinator in a supervisory capacity over Defendants' various employees. During the pertinent period of time, Incor claimed to be exempt from paying overtime wages to Plaintiffs commensurate with the "Companionship Services" exemption found in 29 U.S.C. § 213(a)(15), which exempts payment of overtime wages to employees who provide "Companionship Services" for individuals who are unable to care for themselves. Additionally, Incor did not compensate Plaintiffs at their regular hourly rate for undergoing state-mandated training to provide habilitation training services ("Training Time Claims"). Instead, for training time, Incor awarded Plaintiffs with "training vouchers" which compensated Plaintiffs at minimum wage for each hour of training completed.

In challenging Defendant's use of the Companionship Services exemption, Plaintiffs

claimed that the HTS services provided were not rendered in the "private home" of the individual receiving the services. Plaintiffs also relied upon an exception to the companionship services exemption which requires overtime payment to the employees if they are found to have spent more than 20 percent of their total weekly hours worked performing general household work unrelated to the care of the individuals whom they serve ("20% exception"). The "20% exception" is found in 29 C.F.R. § 552.6.

In response, Incor maintains that the clients' homes were "private" for purposes of utilizing the Companionship Exemption and that Plaintiffs did not spend more than 20% of their time performing general household work unrelated to the care of the individuals, and thus the Plaintiffs do not fall within the "20% exception". Moreover, Incor claims that the state-mandated training required to provide HTS services meets the criteria set out by the United

States Department of Labor exempting "training time" as hours worked.

Finally, Incor asserts that it took no Adverse Action against any employee for filing or joining this lawsuit.

This Court has subject matter jurisdiction over this action. 28 U.S.C. § 1331; 29 U.S.C. § 216(b). Venue is appropriate in this Court 28 U.S.C. § 1391.

II. HISTORY OF THE LITIGATION PRIOR TO TRIAL

The following is a chronology of pertinent dates and rulings which significantly affected this litigation prior to trial[2].

A. On June 4, 2003, Plaintiffs filed the original Complaint naming the following: Kent W. Fowler, Cody Fowler, and Larry Burris, Plaintiffs, v. Incor, Sheltered Work Activity Program, Inc., an Oklahoma Corporation, d/b/a Incor, Edward Breen, Betsy Breen,

[2] The Court uses "significantly affected" to mean orders which resulted in a final resolution of issues. Numerous motions of the defendants for summary judgment were also denied, leaving such issues for trial.

Mitzi Woodburn, Mike Chastain, John Sterling, James Farley, Nedra Lewis, Bill Reynolds and Martin Weaver, Defendants; Case No. CIV-03-321-WH, in the United States District Court for the Eastern District of Oklahoma.

B. On September 4, 2003, Plaintiffs filed their First Amended Complaint adding the following Plaintiffs: Michael Leach, Frances Woods, Roseola Thornburg, Katherine Carroll, Bettie Burnett, Lisa Smith, and Alice Smith.

C. On October 10, 2003, Plaintiffs filed a Second Amended Complaint adding the following Plaintiffs: Adrian Brewer, Cindi Cookson, Debbie Eversole, Lesa Horney, Christine Lane-Huckabay, Leslie Bryant, Kenya Washington, Yolanda White, Angela McVay, Wahkeetha Atkeson, Robert Alfred, Casey Alfred, Dionne Cullom, Angie Miller, Ruby McGee, Carmen Kirkland,

Anntonett Taylor, Carol Sellers, Deloris Wilson, and Warren WhiteKiller.

D. On October 10, 2003, the following Plaintiffs filed Notices of Intent to opt into the lawsuit: Judy Blackmer, Sherry Gardenhire, Lajoya Davis, James Dement, Misty Graham, Sonya July, Stephanie Newman, Nicole Pierce, Mark Reel, Leonard Triggs, Amy Vasquez, and Cynthia Whitfield.

E. On October 20, 2003, Plaintiffs filed a Third Amended Complaint adding the following Plaintiffs: Tia Sallis, Sherry Sallis, Evelyn Sallis, Bruce McCarthy, and Jennifer Wilson.

F. On October 20, 2003, Plaintiff Joretta Truitt opted into the lawsuit by filing a Notice of Intent.

G. Although not clearly delineated in the various complaints, the following Plaintiffs asserted Adverse Action claims against the Defendants: Kent Fowler, Yolanda White, Christine Lane-Huckabay, Carmen Kirkland, Alice Smith, Angela McVay, Ruby

McGee, Joretta Truitt, Cody Fowler, Cynthia Whitfield, Wahkeetha Atkeson, Bettie Burnett and Stephanie Newman[3].

H. On July 2, 2004, Plaintiffs filed a Fourth Amended Complaint adding the following plaintiffs to the caption: Nicole Pierce, Amy Vasquez-McClurg, Cynthia Whitfield, James Dement, Joretta Truitt, Judy Blackmer, Lajoya Davis, Leceif Spring, Leonard Triggs, Mark Reel, Misty Graham, Sherry Chatman-Gardenhire, Sonya July and Stephanie Newman.

I. On July 8, 2004, the Court granted Defendants' Motion for Partial Summary Judgment on Willfulness, Statute of Limitations and Liquidated Damages.

J. On July 8, 2004, the Court granted Defendants' Motion for Summary

---

[3] In their proposed Findings of Fact and Conclusions of Law, defendants list Nicole Pierce among the plaintiffs asserting an Adverse Action claim. The Court does not find such a claim on her behalf reflected in the briefing or the resulting Order (#363).

Judgment of Defendants James Farley, Nedra Lewis, Bill Reynolds and Martin Weaver.

K. On August 3, 2004, the Court granted the motion of Plaintiffs' counsel to withdraw on behalf of named plaintiffs Carol Sellers, Jennifer Wilson and Debbie Eversole and dismissed their claims without prejudice.

L. On August 3, 2004, the Court granted Defendants' Motion for Sanctions against Plaintiffs Debbie Eversole, Mark Reel, Carol Sellers and Warren Whitekiller, and dismissed Plaintiffs Mark Reel and Warren Whitekiller without prejudice.

M. On August 27, 2004, the Court granted Defendants' Motion for Summary Judgment of Defendants Mitzi Woodburn, Mike Chastain and John Sterling.

N. On August 31, 2004, the Court granted Defendants' Motion for Partial Summary Adjudication Regarding the Companionship Exemption to the FLSA and

Regarding Plaintiff Leonard Triggs. The Plaintiff joined in the action outside the statutorily prescribed deadline for filing or joining a claim for overtime pay or to claim any unpaid compensation.

O. On September 3, 2004, the Court granted Defendants' separate Motions for Partial Summary Adjudication Regarding the Companionship Exemption to the FLSA and Regarding Plaintiffs James Dement, Sherry Gardenhire, Amy Vasquez, Dionne Cullom, Adrian Brewer, Robert Alfred, and Evelyn V. Sallis. These Plaintiffs joined in the action outside the statutorily prescribed deadline for filing or joining a claim for overtime pay or to claim any unpaid compensation.

P. On September 16, 2004, the Court granted Defendants' Motion for Partial Summary Adjudication Regarding Plaintiff Kent Fowler, dismissing his Adverse Action claim against Defendants.

Q. On September 17, 2004, the Court granted Defendants' separate Motions for Partial Summary Adjudication Regarding Plaintiffs Christine Lane-Huckabay, Carmen Kirkland, Alice Smith, and Angela McVay, dismissing their Adverse Action claims against Defendants.

R. On September 20, 2004, the Court granted Defendants' separate Motions for Partial Summary Adjudication Regarding Plaintiffs Ruby McGee, Joretta Truitt, and Cody Fowler, dismissing their Adverse Action claims against Defendants.

S. On September 21, 2004, the Court granted Defendants' separate Motions for Partial Summary Adjudication Regarding Plaintiffs Cynthia Whitfield, Wahkeetha Atkeson, Bettie Burnett, and Stephanie Newman, dismissing their Adverse Action claims against Defendants.

T. On September 21, 2004, the Court granted Defendants' separate Motions for Partial

Summary Adjudication Regarding the Companionship Exemption to the FLSA and Regarding Plaintiffs Cindi Cookson, Leslie Ann Bryant, and Casey Alfred. These Plaintiffs joined in the action outside the statutorily prescribed deadline for filing or joining a claim for overtime pay or to claim any unpaid compensation.

FINDINGS OF FACT

FACTS, ISSUES AND CLAIMS JUDICIALLY DETERMINED PRIOR TO TRIAL

Given the posture of this litigation as outlined above, the following Facts, Issues and Claims were determined prior to trial[4]:

1. In 1980, the Sheltered Work Activity Program, Inc. ("SWAP") was formed to serve and support individuals with developmental disabilities (i.e., those with

[4] During trial, plaintiffs presented various offers of proof and evidence in opposition to various rulings already made by the Court. Plaintiffs made a clear record that they did not waive their rights to appeal as to any Finding of Fact or Conclusion of Law contained herein or in previous Orders entered in this case.

an IQ of 75 or below). In 1981, SWAP was incorporated as a not for profit corporation in Oklahoma and in 1982, and received a 501(c)(3) designation from the Internal Revenue Service. In 1982, SWAP began doing business as Incor. (July 8, 2004 Order, page 2.)

2. Commensurate with its mission, Incor serves the needs of the developmentally disabled with several different services, including: a workshop that employs developmentally disabled individuals, employment training, job development, job coaching, recreation and supported living services (aka the "Residential Program"). The Residential Program, which began in December 1989, is intended to normalize the lives of the developmentally disabled individuals by providing them with fellowship, care, training and protection. This is done in their own homes, rather than in an institutional setting. The Residential

Program also seeks to integrate the developmentally disabled into their community and help them be as independent as possible. (July 8, 2004 Order, page 2.)

3. Incor's services are provided to developmentally disabled clients ("client") by Habilitation Training Specialists ("HTS") and "House Managers." House Managers are simply HTS that also perform added administrative duties. Both the HTS and House Managers provide their services in the client's own home. In addition to providing care, training, protection and fellowship in the client's home, the HTS assist clients in interacting in the community. (July 8, 2004 Order, page 2-3.)

4. Incor's Residential Program is regulated by and funded through the Oklahoma Department of Human Services ("DHS"). Approximately 98% of the funding for the residential programs is provided by state

and federal funding through the State of Oklahoma. The DHS is charged with monitoring the services provided to the developmentally disabled throughout the state and insuring that service providers, such as Incor, provide quality service to the clients. In order to ensure quality services for the developmentally disabled, the DHS entered into contracts with each different service provide. These contracts set out requirements that must be met before the provider can be reimbursed for services provided to the developmentally disabled. The DHS contract requirements are enforced through state-employed Case Managers who are assigned to, among other things routinely visit client home, monitor the client's progress, set appropriate client goals, and review necessary documentation concerning the client's activities, care and protection. Pursuant to the DHS contract with service

providers, HTS hours are reimbursed to the service providers at a flat rate, regardless of whether the individual HTS worked over forty (40) hours during that particular week (July 8, 2004 Order, page 3). (The acronym "DHS" has been substituted for "DDSD" where appropriate for consistency throughout this Order.)

5. In 1993, the President of Incor, Ed Breen, attended a conference on behalf of Incor at Western Hills State Lodge concerning issues affecting the developmentally disabled and those organizations providing services to them. At that conference, the executive director of ANCOR (The American Network of Community Options and Resources) based in Washington, D.C., Joni Fritz, advised those in attendance that the companionship exemption would apply to HTS services provided in the homes of the clients. At the time, ANCOR was one of the leading national

organizations providing advice to organizations that provided services to the developmentally disabled. (July 8, 2004 Order, pages 3-4.)

6. At or near the time of the Western Hills' conference, Mr. Breen learned that another Oklahoma provider of HTS services, BIOS, had received confirmation from the U.S. Department of Labor that HTS services provided in the clients' homes were exempt from the FLSA overtime requirements. In turn, Mr. Breen contacted the U.S. Department of Labor and spoke to Mr. Steven Voss. Mr. Voss confirmed that the Department of Labor was treating HTS as "companions" under the FLSA and that HTS services were exempt from the overtime requirement. Following Mr. Breen's conversation with Mr. Voss, and given the information that he had received, Incor also began utilizing the companion ship exemption fro HTS services

provided in the client's home (July 8, 2004 Order, page 4.)

7. On or about April 15, 1994, Mr. Breen attended a DHS sponsored conference in Tulsa for the service providers at which Ms. Fritz was invited to speak. Once again, Ms. Fritz advised the service providers to utilize the companionship exemption with respect to HTS services provided in the homes of the clients. Given the context of the DHS sponsored conference, Mr. Breen considered Ms. Fritz' opinions to be authoritative on the subject and an endorsement by the DHS that service providers should utilize the companionship exemption with respect to HTS services. (July 8, 2004 Order, page 4.)

8. Ms. Fritz' presentations at Western Hills State Lodge in 1993, and in Tulsa in 1994, were attended by DHS Case Management Supervisor, John Rowe. Upon learning of the companionship exemption, DHS

recognized that its utilization would represent two advantages: significant savings to the state and more consistent training and care to the developmentally disabled. As a result of Ms. Fritz' advice and her endorsement by state officials as an authority, many provider organizations began utilizing the companionship exemption in the mid to early 90's. Some of those provider organizations include: Home of Hope, Inc.; BIOS, Inc.; Volunteers of American, Inc.; Gatesway; and Developmental Services of Tulsa. (July 8, 2004 Order, pages 4-5.)

9. Mr. Breen considered the advise of Ms. Fritz and the DHS to be authoritative with respect to utilization of the companionship exemption. Moreover, Mr. Breen's belief was further strengthened by the U.S. Department of Labor's position on BIOS's use of the companionship exemption as

well as his own discussions with Mr. Voss. (July 8, 2004 Order, page 5).

10. In 1995, Mr. Breen revised Incor's job description for Habilitation Training Specialists to incorporate the companionship exemption. Although specific duties are listed in the job description for Habilitation Training Specialists, the overall responsibility for HTS is to provide protection, care and training for the client. Even though the job description for HTS at Incor has undergone some slight modification over the years, it has always been Incor's intention that the HTS job description reflect companionship services consistent with the FLSA exemption. (July 8, 2004 Order, page 5.)

11. Defendant's conduct was not "willful" under the FLSA. (Order July 8, 2004).

12. The Court's Order of July 8, 2004 regarding the alleged "willfulness" of Defendant's conduct affect both the statute of

limitations for Plaintiffs' Claims and Damages and Plaintiffs' potential recovery of Liquidated Damages. Pursuant to 29 U.S.C. § 255(a) a "willful" violation of the FLSA is accorded a three year statute of limitations period. Otherwise, the statute of limitations is two years. Further, the same "willfulness" standard utilized for the statute of limitations applied to Plaintiffs' claims for liquidated damages. By its July 8, 2004 Order, the Court ruled that the applicable statute of limitations for each Plaintiff's claims and damages was two years from the date each person was added as a party, either by amended complaint or written consent, and <u>not</u> two years from the date the original Complaint was filed consistent with 29 U.S.C. § 256. Thus, liquidated damages will not be awarded to the Plaintiffs in any event. (Order of July 8, 2004.)

13. The client's residences located at 710 W. Indianola; Rt. 1, Box 225C; 520 Maple; 1716 N. Jones; 715 S. York; 408 Belmont; 2302 Monta Avenue; 1135 Summitt; and Bethany Anne Ellis' foster home (orders ## 322, 332, 333, 335, 336, 337, 339, 342, and 334, respectively) are private homes for the purposes of applying the companionship services exemption.

FACTS RELATING TO ALL CLAIMS

14. The Court observed that during their testimony, both Ed and Betsy Breen were competent and knowledgeable. They obviously knew all aspects of the provisions of companionship services to the developmentally disabled. They obviously care deeply about both their clients and their employees. During cross examination by opposing counsel, they were never intentionally evasive. The Court believed them both to be highly credible. Even if any violations of law were found to have

occurred, the Court would be wholly incapable, after observing their testimony and demeanor on the witness stand, of believing such violations resulted from the bad faith, malicious intent or even willful negligence of the Breens.

15. Conversely, many of the individual Plaintiffs seemed to have little clue why they were present and testifying. Some of their demeanor was lackadaisical and uncaring. Some of them were resentful and obviously had an axe to grind with Incor.[5] Notable exceptions to this description of their general demeanor do exist; however, overall, the credibility of the

---

[5] Throughout this Order, the Court may refer to such individuals as "axe-grinders." This phrase is intended to be merely descriptive. See, e.g., Nixon v. Runyon, 856 F.Supp. 977, 985 (E.D.Pa. 1994) ("The Court does not find Ms. Bearden credible, given her demeanor on the stand, her relationship to the plaintiff, and the axe she has to grind with the Postal Service.") It is simply a short-hand description of those Plaintiffs who decided to voluntarily forego the opportunity to testify objectively and respectfully, and instead engaged in excessive advocacy for their cause, and exhibited peculiar animosity towards Incor.

Plaintiffs was far surpassed by that of the Breens.

FACTS RELEVANT TO THE "EMPLOYER" STATUS OF DEFENDANTS ED AND BETSY BREEN UNDER THE FLSA

16. Incor is a not-for-profit corporation in Oklahoma and has been designated as a 501(a)(3) corporation by the Internal Revenue Service. (Defendant's Exhibit 50, page 188; Trial Transcript, page 28, line 22-page 29, line 2.)

17. Ed Breen is the CEO at Incor. (Trial Transcript, page 7, lines 3-6.)

18. Betsy Breen has been the director of operations at Incor for the last ten years. (Trial Transcript, page 6, lines 17-21.)

19. There are no outstanding shares of stock in Incor. (Trial Transcript, page 39, lines 3-6.)

20. No one owns stock in Incor. (Trial Transcript, page 39, lines 7-8.)

21. Ed and Betsy Breen's salary or bonuses are not based upon Incor's financial status, or

Incor's profits or losses. (Trial Transcript, page 39, lines 9 – page 40, line 1.)

FACTS RELATED TO THE PLAINTIFFS' "TRAINING TIME" CLAIMS

22. In order to provide companionship services as an HTS in the State of Oklahoma, the Oklahoma Department of Human Services ("DHS") requires a certain level of basic training regarding the developmentally disabled. (Trial Transcript, page 43, line 11-21; Defendants' Exhibit 50, pages 0001, 0006-0008.)

23. The DHS also requires that HTS remain current on their training by mandatory updated training on an annual basis. (Defendants Exhibit 50, page 0008; Trial Transcript, page 51, line 21-23.)

24. Only certain courses certified by the State meet the required training criteria. (Defendants' Exhibit 50, page 0008; Trial Transcript, page 51, line 24 – page 52, line 13.)

25. Based upon the facts that the State-mandated training was not specifically related to any client served by Incor and was transferable by the HTS should they chose to move to another provider of HTS services, Incor did not consider the time spent by employees for HTS training as compensable under the FLSA consistent with Oklahoma Department of Labor Regulation 380:30.1-12(b)(2). (Defendants' Exhibit 50, page 0241; Trial Transcript, page 56, line 17 – page 58, line 5.)

26. Incor's policy concerning compensation for training time was also based upon wage and hour seminars attended by Incor's management. (Trial Transcript, page 53, line 5 – page 55, line 13; Defendants' Exhibit 50, page 0017, 0091, 0092.)

27. In the event one of Incor's clients had special needs which required specialized training for the HTS, an "in-service" was

conducted, at which the HTS were paid their regular hourly rate. (Trial Transcript, page 50, line 12-25.)

28. Although the HTS training time was not compensable, Incor paid Training vouchers to HTS for time spent taking State-mandated training. The training vouchers amounted to approximately minimum wage for each hour the employee completed in training. (Trial Transcript, page 55, line 16-page 56, line 16.)

29. To fulfill the State's training requirements, Incor would notify the HTS two weeks to one month in advance of the training so that the House Manager and HTS could adjust their respective schedules and the HTS complete their regular number of working hours that week and still receive the training. In other words, the HTS could complete the state-mandated training and still work a full work week. (Trial Transcript, page 47, line 25 – page 48, line

8; page 73, line 24 – page 74, line 21; Plaintiffs' Exhibit 188, page 06270.)

30. Incor does not require any additional training than that already required by the DHS to service as a Habilitation Training Specialist in the state of Oklahoma. (Trial Transcript, page 44, line 7-10; page 77, line 23-25.)

31. Incor pays for the costs of the employee's habilitation training. (Trial Transcript, page 44, lines 3-6; page 80, line 25 – page 81, line 1.)

32. In the event the training course did not fit the HTS' schedule, the HTS would advise Incor and the HTS would be rescheduled for training at another approved course in the future. (Trial Transcript, page 48, line 9-12.)

33. If the HTS was enrolled in the course and did not attend, the course provider generally would charge Incor a "no-show" fee. If the HTS' absence from the training

was not adequately explained, Incor reserved the right to pass on the "no-show" fee to the HTS. (Trial Transcript, page 48, line 9 – page 49, line 14.)

34. In the event Incor's HTS were ever found to be untrained or their training had lapsed, Incor was subject to forfeiting to DHS the money charged to the State for any hours worked by an "untrained" HTS. Such a forfeiture potentially works a double penalty on Incor because it is almost certain that the HTS will have already been paid for the HTS hours worked before DHS declares the HTS "untrained" and demands return of any money charged for HTS hours worked while out of compliance. (Trial Transcript, page 76, line 4 – page 77, line 18.)

35. DHS requires Incor's training policy to match DHS' policy. (Trial Transcript, page 82, lines 12-17).

36. Incor has no choice in its training policy. (Trial Transcript, page 82, lines 12-20.)

37. DHS required twenty hours of annual training for Habilitation Training Specialists and Incor imposed no additional training requirements. (Trial Transcript, page 51, lines 21-23; Defendants' Exhibit 40, page 0005.)

FACTS RELATED TO "PRIVATE HOUSE" STATUS: FACTS COMMON TO ALL HOMES

38. Incor's purpose is to serve the developmentally disabled adults in northeastern Oklahoma. (Trial Transcript, page 27, lines 11-13.)

39. Developmentally disabled are typically individuals with an I.Q. of 75 or less. (Trial Transcript, page 27, lines 14-19.)

40. Incor provides services to developmentally disabled individuals pursuant to a contract with the Oklahoma Department of Human Services ("DHS"). (Trial Transcript, page 35, lines 3-20.)

41. The contract between Incor and DHS requires that the Daily Living Support provided by HTS is "... furnished to adults who reside in a home that is leased or owned by the person(s) receiving services." (Defendants' Exhibit 40, page 0015, addendum 2002-03.)

42. The contract between Incor and DHS further provides:

> The Agency will comply with assurances contained in the consent decree including but not limited to:
>
> a. supporting the active involvement of consumers and their parents and guardians in the team process.
>
> b. complying with contract and policy provisions including but not limited to the Individual Plan Policies, Health Policy.
>
> c. supporting and implementing the individual plan.

d. supporting whenever possible the views, preferences and advice of the individuals, his or her parents or guardian.

e. residential supports that are least restrictive and consistent with individuals' plans.

f. assuring individuals live in a home of their choice and with roommates, if they so choose.

(Defendants' Exhibit 40, page 0016, addendum 2003-04.) (emphasis added.)

43. HTS received specific training on teaching clients to make choices. (Defendants' Exhibit 40, page 0143.)

44. Incor did not require clients to have roommates or determine the composition of any home. (Trial Transcript, page 180, lines 17-20; page 235, lines 5-14.)

45. Incor did not lease, own or have any possessory interest in the homes leased by

their clients.[6] (See, relevant Lease Agreements, Footnote 3.)

46. The provision of Incor's services was not dependent upon the clients residing in any particular location. (Trial Transcript, page 199, lines 13-25.)

47. The parents/guardians of the clients are allowed to screen/dismiss HTS staff from the home if they wish to exercise that prerogative. (Trial Transcript, page 389,

---

[6] Yarbrough, Swindler, LeFlore Lease Agreements, Defendants' Exhibit 47, pages 810 Sherwood-2222-2223; 505 Judy Lane Lease Agreement, Defendants' Exhibit 42, pages 505 Judy-1409-1412; Capps Lease Agreement, Defendants' Exhibit 51, page 315 N. 15th-0003; D.B. & J.T., 551 Sherwood Lease Agreement, Plaintiffs' Exhibit 24, pages Plaintiffs'-00738-00739; 505 N. G Street Lease Agreement, Plaintiffs' Exhibit 34, pages Plaintiffs'-01089-01091; 919 Choctaw Lease Agreement, Plaintiffs' Exhibit 46, page Plaintiffs'-01395; E. Jordan, 925 Callie Lease Agreement, Plaintiffs' Exhibit 64, page Plaintiffs'-01630; 1135 Summit Lease Agreement, Plaintiffs' Exhibit 66, pages Plaintiffs'-01636-01637; 300 N. 40th Lease Termination, Defendants' Exhibit 38, page 300 N. 40th-1123; 826 S. York, #1B Lease Agreement, Defendants' Exhibit 35, pages 826 S. York-0001-0002, 0113; 901 Eric Lease Agreement, Defendants' Exhibit 44, page 901 Erie-0368; 2200 Turner Lease Agreement, Plaintiffs' Exhibit 19, Plaintiffs'-00583-00586.

lines 9-11; Trial Transcript, page 325, line 23 – page 326, line 2.)

48. Incor does not guarantee any repairs, maintenance, or conditions of the premises after the clients leave. (Trial Transcript, page 200, line 22 – page 201, line 1.)

49. A client typically begins receiving services after a referral through a DHS case manager ("Case Manager"). (Trial Transcript, page 36, lines 11-21.)

50. Normally, the client and his parent/guardian will interview several provider agencies and then select one. (Trial Transcript, page 36, lines 11-21.)

51. Once Incor is selected by the client as his provider, the client's parent or guardian enter into a Service Agreement/Financial Agreement (collectively "Service Agreement") in which the parent/guardian requests Incor to perform certain responsibilities for the care and well-being

of the client.[7] (See, relevant Service Agreements, Footnote 4.)

---

[7] Harrison Service Agreements, Defendants' Exhibit 44, pages 901 Erie-0448-0458; Yarbrough Service Agreements, Defendants' Exhibit 47, pages 810 Sherwood-2229-2236; Swindler Service Agreements, Defendants' Exhibit 47, pages 810 Sherwood-2317-2320 and Plaintiffs' Exhibit 28, pages Plaintiffs'-00882-00883; LeFlore Service Agreements, Defendants' Exhibit 47, pages 810 Sherwood-2393-2395; Lawmaster Service Agreements, Defendants' Exhibit 42, pages 505 Judy-1413-1416; Haas Service Agreements, Defendants Exhibit 42, pages 505 Judy-1530-1535; Capps Service Agreements, Defendants' Exhibit 51, pages 315 N. 15th 0004-0005; Ballard Service Agreement, Defendants' Exhibit 51, pages 315 N. 15th 0006-0007; Thomas Service Agreement, Defendants' Exhibit 51, page 315 N. 15th 0008; J.T. Service Agreements, Plaintiffs' Exhibit 23, pages Plaintiffs'-00723-00724, pages Plaintiffs'-00730-00731, pages Plaintiffs'-00733-00735; D.B. Service Agreements, Plaintiffs' Exhibit 23, pages Plaintiffs'-00725-00729; Breen Service Agreements, Plaintiffs' Exhibit 33, pages Plaintiffs'-01085-01088; K.J. Service Agreement, Plaintiffs' Exhibit 37, pages 01148-01149; B.C. Service Agreements, Plaintiffs' Exhibit 45, pages Plaintiffs-01380-01390; J.S. Service Agreements, Plaintiffs' Exhibit 54, pages Plaintiffs'-01528-01531; Ballard Service Agreement, Plaintiffs' Exhibit 60, page Plaintiffs'-01615; E. Jordan Service Agreement, Plaintiffs' Exhibit 63, pages Plaintiffs'-01628-01629; E.T. Service Agreement, Plaintiffs' Exhibit 67, page Plaintiffs'-01639; G.K. Service Agreement, Plaintiffs' Exhibit 67, page Plaintiffs'-01640; Moore Service Agreement, Plaintiffs' Exhibit 50, pages Plaintiffs'-01489-01492; Wilkie Service Agreement, Plaintiffs' Exhibit 7, pages Plaintiffs'-00107-00108, 00113-00114, 00119-00120; Oman Service Agreement, Plaintiffs' Exhibit 18, pages Plaintiffs'-00577-00582; Reece Service Agreements, Plaintiffs' Exhibit 18, pages Plaintiffs'-00569-00576.

52. The Service Agreements dictate what services Incor will provide to the client. Generally, the Service Agreement requires that Incor provide: Habilitation Training Services as prescribed by the client's Interdisciplinary Team ("IP Team"); transportation services; assist the client with his/her finances; dictates how the client's money will be spent; that Incor will provide trained HTS staff. Further, the Service Agreement confirms the client's/

Lawmaster Financial Agreements, Defendants' Exhibit 42, pages 505 Judy-1409-1412; Wilkie Financial Agreement, Defendants' Exhibit 42, pages 505 Judy-1478-1483; Haas Financial Agreement, Defendants' Exhibit 42, pages 505 Judy-1528-1529; J.T. Financial Agreement, Plaintiffs' Exhibit 23, page Plantiffs'-00732; D.B. Financial Agreement, Plaintiffs' Exhibit 23, pages Plaintiffs'-00736-00737; Yarbrough Financial Agreements, Plaintiffs' Exhibit 28, pages Plaintiffs'-00867-00872; Swindler Financial Agreements, Plaintiffs' Exhibit 28, pages Plaintiffs'-00884-00890; J.S. Financial Agreements, Plaintiffs' Exhibit 33, pages Plaintiffs'-01073-01080; K.J. Financial Agreement, Plaintiffs' Exhibit 37, pages Plaintiffs'-01150-01151; B.C. Financial Agreements, Plaintiffs' Exhibit 45, pages Plaintiffs' Exhibit 45, pages Plaintiffs'-01391-01394; K.M. Financial Agreement Plaintiffs' Exhibit 50, pages Plaintiffs'-01489-01492; E.T. Financial Agreement, Plaintiffs' Exhibit 67, page Plaintiffs'-01638.

guardian's ultimate responsibility with respect to home management. (Trial Transcript, page 37, lines 2-11; See Service Agreements, Footnote 4.)

53. Incor is not paid for providing financial services to the client (i.e., maintaining eligibility for State and Federal benefit; assistance in client bill paying, balancing client's cash and receipts in the home lock box). (Trial Transcript, page 37, lines 18-29; page 67, lines 1-13; page 144, lines 9-20; page 244, lines 22-24, page 268, lines 4-7; Service Agreements, Footnote 4.)

54. In the event there was no Service Agreement in place between the client's parent/guardian and Incor, the parent/guardian would be responsible to provide ancillary services (e.g. financial, transportation, etc.) for the client. (Trial Transcript, page 37, line 25 – page 38, line 10.)

55. None of the Lease/Rental Agreements between the individual clients and their respective landlords condition residency on the continued provision of services by Incor. (Lease Agreements listed in Footnote 3; Trial Transcript, page 199, line 13-25.)

56. There is no cost to the client for the services provided by Incor; the HTS services are paid in full by DHS. (Services Agreements, listed in Footnote 4, typically in paragraph 1; Trial Transcript, page 205, line 25 – page 206, line 3.)

57. The clients pay their own living expenses, not to exceed $14.00 per day up to ninety percent (90%) of their earned or unearned income. (Trial Transcript, page 37, lines 12-24; Service Agreements listed in Footnote 4.)

58. Incor is not responsible for the maintenance of the client's residence or home management. (Service Agreements

listed in Footnote 4; Trial Transcript, page 200 line 22 – page 201, line 1.)

59. None of Incor's clients could care for themselves without the assistance of Incor or a similar provider. (Trial Transcript, page 67, lines 19-22.)

60. Client's money is maintained in a consumer account segregated solely for the use of the client. (Trial Transcript, page 149, lines 5-25.)

61. Although Incor may assist the client in writing checks for the client's bills, at all times the client's funds are used to pay his/her bills. (Trial Transcript, page 150, lines 1-7.)

62. Incor is subjected to multiple financial audits each year. (Trial Transcript, page 150, lines 8-17.)

63. DHS requests that some records and documents associated with the client be maintained in that client's home (Trial Transcript, page 165, lines 4-18.)

64. Incor's clients were allowed to change homes and/or roommates at their discretion or that of their parent/guardian or IP Team. (Trial Transcript, page 206, line 12 – page 207, lines 1-4.)

65. Incor does not negotiate leases or rental agreements on client's homes. (Trial Transcript, page 198, lines 1-16.)

66. DHS prepares a "Plan of Care" that dictates the State's financial resources to be expended upon the client. (Trial Transcript, page 203, line 21 – page 204, line 12.)

67. The number of units included in the client's "Plan of Care" is set by the DHS case manager. (Trial Transcript, page 205, lines 2-9.)

68. Incor has no policy, plan or scheme to control the homes of their clients. (Trial Transcript, page 206, lines 8-11.)

69. Incor's HTS only assist clients/guardians in locating a home at the request of the

client, parent/guardian or IP Team. (Trial Transcript page 207, line 5 page 208, line 6.)

70. Client's homes are selected by their families, advocates, the clients themselves or Case Managers, but not by Incor. (Trial Transcript, page 234, line 22 – page 235, line 4.)

71. The Service Agreements between Incor and the client's parent/guardian may vary from client to client, such as: whether the client is receiving vocational services; whether a family member is acting as the client's health care coordinator; or whether a family member is assisting the client with his finances. (Trial Transcript, page 237, lines 6-18.)

72. The "Interdisciplinary Team" or "IP Team" is a group of individuals, including the client and their DHS case manager, therapist, health care providers, and others close to the client that consider and resolve issues

regarding the care and provision of services provided to the client. (Trial Transcript, page 238, line 1-19; page 246, lines 8-18.)

73. If transportation responsibilities are not included in the Service Agreement, the parent/guardian is responsible to provide those services. (Trial Transcript, page 239, line 10-21.)

74. Incor only assists the clients with their financials as part of the Service Agreement and at the request of the parent/guardian. (Trial Transcript, page 240, lines 3-14.)

75. In the event the client's money must be expended to maintain certain governmental benefits ("spend down"), the client's IP Team approves the purchase. (Trial Transcript, page 241, line 14 – page 242, line 6.)

76. DHS dictates for what purpose room and board funds provided by the State may be

used. (Trial Transcript, page 242, line 7 – page 243, line 21.)

77. HTS are trained to treat the residence as the client's home. (Defendants' Exhibit 40, page 0126, page 0179; Trial Transcript, page 245, line 25 – page 246, line 7.)

78. DHS reserves the right to review and approve the Service Agreements between Incor and the client's parent/guardian. (Trial Transcript, page 247, line 25 – page 248, line 7.)

79. Individualized Plans ("I.P.s") are generated by the DHS Case Managers and IP Teams for the clients. (Trial Transcript, page 249, line 16-20; See also, Footnote 5.)[8]

---

[8] Individual Plans for: Harrison, Defendants' Exhibit 44, pages 901 Erie-0479-0488; Duty, Defendants' Exhibit 44, pages 901 Erie-0383-0386; Moore, Defendants' Exhibit 38, pages 300 N. 40th-1148-1161; Yarbrough, Defendants' Exhibit 47, pages 810 Sherwood-2269-2281; Swindler, Defendants' Exhibit 47, pages 810 Sherwood-2345-2358; LeFlore, Defendants' Exhibit 47, pages 810 Sherwood-2396-2404; Lawmaster, Defendants' Exhibit 42, pages 505 Judy-1435-1449; Wilkie, Defendants' Exhibit 42, pages 505 Judy-1504-1526; Haas, Defendants' Exhibit 42, pages 505 Judy-1547-1663.

80. Several of the clients' parents/guardians do not live in the same town as the child/ward. (Trial Transcript, page 250, line 21-24.)

81. Incor does not retain any of the money paid by the state for the client's room and board. (Trial Transcript, page 260, lines 1-16.)

82. The only funds received by Incor from the state are the hours billed for HTS services. (Trial Transcript, page 260, lines 1-16.)

83. Any general household work listed in the client's IP under a "Schedule of Events" was a guideline prepared by the DHS Case Manager and not a schedule for each shift. (Trial Transcript, page 276, line 24 – page 278, line 13.)

84. If clients request that the paperwork be removed from their homes, those requests are met. (Trial Transcript, page 521, line 20 – page 522, line 1.)

85. DHS requires that medications be locked up in the client's home for safety. (Trial Transcript, page 308, line 25 – page 309, line 5.)

86. The homes in which the clients live in Incor's Residential Program are much different than an institutional setting, in that freedom of choice and freedom of movement in the client's home are much less restricted than in an institutional setting. (Trial Transcript, page 311, line 17 – page 312, line 21.)

87. "Outcomes" which are set out in the client IP are training activities designed to increase the client's independence. (Trial Transcript, page 320, line 8-13.)

88. HTS are directed by the treatment team to complete certain documentation regarding the client, whether the client lives in their parents' homes or separate homes/apartments. (Trial Transcript, page 309, line 6-17.)

89. Incor management does not issue keys to the client's home to the HTS for use at the HTS convenience. (Trial Transcript, page 309, lines 22-25.)

90. All points on the Service Agreement between Incor and the client's parent/guardian are negotiable. (Trial Transcript, page 313, lines 23-25.)

91. DHS required that certain documents/data collection related to the services being provided to the client be kept on site with the client. (Trial Transcript, page 394, lines 1-11.)

FACTS COMMON TO SPECIFIC HOMES[9]

505 JUDY LANE

92. Clients Haas, Lawmaster and Wilkie leased the property located at 505 Judy Lane,

---

[9] The Court denied summary judgment as to private home status regarding the following homes for which no trial evidence was presented by either party. 608 S. Water (Order #331); 1493 Lane Avenue (Order #338); 101 David Lane, Apt. 606 (Order #340) and 611 Austin (Order #340). Because Plaintiffs did not present evidence demonstrating that any plaintiff worked at these houses, judgment is entered in favor of Defendants as to these four homes.

from Kathy Morrissey beginning October 1, 1997, for $925 per month. (Lease Agreement, Defendants' Exhibit 42, pages 505 Judy-1409-1412.)

93. Incor is not listed as a lessee on the lease documents and does not maintain any interest in the property located at 505 Judy Lane. (Lease Agreement, Defendants' Exhibit 42, pages 505 Judy-1409-1412.)

94. Clients Haas, Lawmaster and Wilkie require assistance in all aspects of home management and personal daily living at 505 Judy Lane. Each of these ladies is profoundly disabled. (Trial Transcript, page 907, lines 14-21.)

95. Ms. Haas, Ms. Lawmaster and Ms. Wilkie pay for the monthly expenses in the home including lease payments, utilities, furnishings, and groceries from their respective monthly benefit checks, not to exceed $14.00 per day. (Lawmaster Service Agreements, Defendants' Exhibit

42, pages 505 Judy-1409-1416; Haas Service Agreements, Defendants' Exhibit 42, pages 505 Judy-1528-1535; Wilkie Service Agreement, Defendants' Exhibit 42 pages 505 Judy-1478-1483.)

96. The Rental Agreement executed between Ms. Haas, Ms. Lawmaster, Ms. Wilkie and Kathy Morrissey does not condition residency on the continued provision of services by Incor. (Lease Agreement, Defendants' Exhibit 42, pages 505 Judy-1410-1412.)

97. Incor is not responsible for the maintenance of the residence at 505 Judy Lane. (Lawmaster Service Agreements, Defendants' Exhibit 42, pages 505 Judy-1409-1416; Haas Service Agreements, Defendants' Exhibit 42, pages 505 Judy-1528-1535; Wilkie Service Agreement, Defendants' Exhibit 42, pages 505 Judy-1478-1483.)

98. There is no space reserved as office space at 505 Judy Lane. (Trial Transcript, page 253, lines 19-24.)

2200 TURNER

99. Incor does not rent the 2200 Turner home to the clients living there. (Trial Transcript, page 301, lines 18-20.)

100. The 2200 Turner address was selected by the IP team and the guardian of Mr. Oman. (Trial Transcript, page 301, lines 21-24.)

101. The clients at 2200 Turner chose each other as roommates. (Trial Transcript, page 302, 7-19.)

102. Services provided to clients at 2200 Turner were not contingent upon their residing at that address. (Trial Transcript, page 302, lines 20-23.)

103. Incor has no possessory interest in the home at 2200 Turner. (Trial Transcript, page 302, line 24 – page 303, line 1.)

104. The Service Agreement between Incor and client Oman's guardian indicates that the client and/or his guardian is ultimately responsible for the management of the home. (Trial Transcript, page 303, line 20 – page 304, line 12.)

105. The client and guardian choose who comes and goes from the home (Trial Transcript, page 304, line 13-15.)

106. The client and guardian have a choice as to which HTS enter the client's home. (Trial Transcript, page 304, line 16-18.)

107. The client and guardian can dismiss an HTS from the client's home. (Trial Transcript, page 304, line 19 – page 305, line 3.)

108. The Lease Agreement for 2200 Turner indicates that it is privately owned by Bill and Pat Perry. (Trial Transcript, page 306, lines 4-9, Plaintiffs' Exhibit 19, pages Plaintiffs'-00583-00586.)

109. Bill and Pat Perry have no relationship with Incor management. (Trial Transcript, page 301, lines 12-17.)

110. Incor does not expend its own money for the management and maintenance of the client's home. (Trial Transcript, page 307, line 13-21.)

111. If the clients at 2200 Turner changed service providers, the clients would not have to leave the home. (Trial Transcript, page 302, lines 20-23; 307, line 22 – page 308, line 1.)

112. Incor does not maintain an office at 2200 Turner. (Trial Transcript, page 308, lines 19-24.)

113. DHS required that medications be locked up in the client's home for safety. (Trial Transcript, page 308, line 25 – page 309, line 5.)

114. HTS are directed by the treatment team to complete certain documentation regarding the clients, regardless of whether the

client lives in their parents' homes or separate homes/ apartments. (Trial Transcript, page 309, line 6-17.)

115. Incor did not generate chore lists for the HTS working at 220 Turner. (Trial Transcript, page 309, line 18-21.)

116. Incor management does not issue keys to the client's home to the HTS for use at the HTS convenience. (Trial Transcript, page 309, lines 22-25.)

117. All points on the Service Agreement between Incor and the client's parent/guardian are negotiable. (Trial Transcript, page 313, lines 23-25.)

118. The clients at 2200 Turner are given choices on how they live. (Trial Transcript, page 310, line 23 – page 311, line 16.)

119. The homes in which the clients live in Incor's Residential Program are much different than an institutional setting, in that freedom of choice and freedom of movement in the client's home are much

less restricted than in an institutional setting. (Trial Transcript, page 311, line 17 – page 312, line 21.)

120. "Outcomes" which are set out in the client IP are training activities designed to increase the client's independence. (Trial Transcript, page 320, line 8-13.)

121. Clients Oman and Reece leased the property located at 2200 Turner from Bill and Patricia Perry for $600.00 per month. (Lease Agreement, Plaintiffs' Exhibit 19, Plaintiffs'-00583-00586.)

810 SHERWOOD

122. The residence at 810 Sherwood is owned by David Doyle; he is not affiliated in any way with Incor. (Trial Transcript, page 323, lines 15-20.)

123. The home at 810 Sherwood was chosen for the clients by their respective guardians. (Trial Transcript, page 323, lines 21-23.)

124. Clients would not be required to leave 810 Sherwood if they were not receiving

services from Incor. (Trial Transcript, page 324, line 7-10.)

125. Incor does not have any possessory interest in 810 Sherwood. (Trial Transcript, page 324, line 11-13.)

126. The clients and guardians have control of who comes and goes from the 810 Sherwood home. (Trial Transcript, page 324, line 15-17.)

127. The Service Agreements for the clients at 810 Sherwood are essentially the same. (Trial Transcript, page 327, lines 1-6.)

128. The clients who reside at 810 Sherwood were originally served by a different agency in a poorly maintained home. The guardians of the clients demanded the clients change homes. (Trial Transcript, page 327, lines 7-16.)

129. The clients at 810 Sherwood were living together before Incor became their service provider. (Trial Transcript, page 327, lines 16-20.)

130. Incor agrees to provide assistance with the clients' finances at no charge as part of their responsibility to protect the clients. (Trial Transcript, page 328, line 23 – page 329, line 10.)

131. The clients at 810 Sherwood would be allowed to live at that address even if they no longer received services from Incor. (Trial Transcript, page 329, line 14-17.)

132. Incor has no right to move the clients at 810 Sherwood. (Trial Transcript, page 329, lines 18-20.)

133. Incor does not reserve any type of office space at 810 Sherwood. (Trial Transcript, page 329, line 25 – page 330, line 2.)

134. There is no office or desk at 810 Sherwood. Incor does not designate where the HTS must complete their paperwork. (Trial Transcript, page 330, lines 3-9.)

135. Incor did not generate a chore list for the HTS to follow at 810 Sherwood. (Trial Transcript, page 330, lines 10-12.)

136. Keys are not issued to the HTS at 810 Sherwood. (Trial Transcript, page 330, line 16-21.)

137. The clients at 810 Sherwood are profoundly disabled. (Trial Transcript, page 331, lines 12-13.)

138. Every service provided by the HTS, pursuant to their job description, is related to the care, protection, training, and companionship of the clients at 810 Sherwood. (Trial Transcript, page 331, lines 14-18.)

139. If there were no Service Agreement in place, Incor would not provide services to the clients. (Trial Transcript, page 342, lines 22-24.)

140. Incor clients Yarbrough, Swindler and Leflore leased the property located at 810 Sherwood in Muskogee Oklahoma from "David D." beginning November 1, 2000. (Lease Agreement, Defendants' Exhibit 47, pages 810 Sherwood-2222-2225.)

141. The Clients, Yarbrough, Swindler and Leflore, lease the home from "David D." for $750.00 per month. (Lease Agreement, Defendants' Exhibit 47, pages 810 Sherwood-2222-2225.)

142. Incor was not responsible for the maintenance of the dwelling at 810 Sherwood. The landlord was responsible for maintaining the dwelling. (See, Lease Agreement, Defendants' Exhibit 47, pages 810 Sherwood-2222-2225.)

143. Clients Yarbrough, Swindler and Leflore each pay $14.00 per day for all living expenses. Each client pays for her share of the monthly living expenses in the home including lease payments, utilities, furnishings and groceries using monthly benefit checks. Each client pays for her own clothing, toiletries, and incidentals. Incor employees do not maintain the home or its property. Rather, the clients, their guardians or the landlords are

responsible for maintenance and its cost. (Yarbrough Service Agreements, Defendants, Defendants' Exhibit 47, pages 810 Sherwood-2229-2236; Swindler Service Agreements, Defendants' Exhibit 47, pages 810 Sherwood-2317-2320; LeFlore Service Agreements, Defendants' Exhibit 47, 810 Sherwood-2393-2395.)

901 ERIE ST.

144. The clients previously residing at 901 Erie now live at a different location. (Trial Transcript, page 355, lines 3-6.)

145. The 901 Erie home was selected by the clients and one of the clients' mothers. (Trial Transcript, page 356, line 14-15.)

146. The clients and one of the client's mothers are responsible for the ultimate management and control of the home. (Trial Transcript, page 356, lines 16-20.)

147. The clients at 901 Erie are not profoundly disabled and have jobs in the community.

(Trial Transcript, page 356, line 21 – page 357, line 14.)

148. 901 Erie was leased from Monte Snellgrove. Mr. Snellgrove is not associated with Incor. (Trial Transcript, page 358, line 4 – page 359, line 2; Lease Agreement, Defendants' Exhibit 44, page 901 Erie-0368.)

149. The clients' occupancy at 901 Erie was not contingent upon the clients receiving services from Incor. (Trial Transcript, page 359, line 8-10.)

150. The clients previously at 901 Erie are no longer there by the choice of one of the clients. (Trial Transcript, page 363, line 18 – page 364, line 9.)

151. The clients at 901 Erie exercised choice in what they wanted with some guidance. (Trial Transcript, page 366, lines 1-10.)

152. The clients at 901 Erie were allowed to move about their home freely. (Trial Transcript, page 366, lines 22-24.)

153. The lock box in the clients' home is used for storing the clients' medications and keeping them safe from the clients. (Trial Transcript, page 366, line 17 – page 367, line 7.)

154. The clients at 901 Erie were given a great deal of choice inside and outside their home as to their activities. (Trial Transcript, page 367, line 6 – page 370, line 1.)

155. The clients at 901 Erie paid the deposit on their home. (Trial Transcript, page 382, lines 7-11.)

156. The training provided to the clients was performed in their home and in the community. (Trial Transcript, page 384, lines 20-22.)

157. Incor clients Duty, Harrison and Thomas leased the property located at 901 Erie St. in Muskogee Oklahoma from Monte Snellgrove beginning July 6, 1997, for $600.00 per month. Incor is not listed as a lessee on the lease documents. (Lease

Agreement, Plaintiffs' Exhibit 44, page 901, Erie-0368.)

158. The lease executed between Duty, Harrison, Thomas and Snellgrove does not condition residency on the continued provision of services by Incor. (Lease Agreement, Plaintiffs' Exhibit 44, page 901 Erie-0368.)

159. Clients Duty and Harrison each pay $14.00 pr day for all living expenses. (See, Harrison Service Agreements, Defendants' Exhibit 44, pages 901 Erie-0448 – 901 Erie-0458.)

551 SHERWOOD

160. The clients at 551 Sherwood have mental ages of between one and three years old and require extensive assistance in the skills of everyday living. (Trial Transcript, page 387, lines 11-22.)

161. 551 Sherwood is owned by Gary and Carla Dunlop. (Trial Transcript, page 388, lines 2-7.)

162. The guardians selected 551 Sherwood for the clients. (Trial Transcript, page 388, lines 8-15.)

163. Incor has no possessory interest in 551 Sherwood. (Trial Transcript, page 388, lines 20-22.)

164. The continuation of Incor's services was not contingent upon the clients living at 551 Sherwood. (Trial Transcript, page 388, lines 16-19.)

165. Gary and Carla Dunlop are not associated with Incor. (Trial Transcript, page 388, lines 23-24.)

166. The clients and their guardians were ultimately responsible for the management and control of their home. (Trial Transcript, page 389, lines 9-11.)

167. The clients and guardians of 551 Sherwood have control over who has access to the home. (Trial Transcript, page 390, lines 4-6.)

168. The client's money is used to maintain the client's home. (Trial Transcript, page 391,

lines 8-9; Brandon Service Agreements, Plaintiffs' Exhibit 23, pages Plaintiffs'-00725-00729.)

169. The client's room and board money was utilized consistent with their Service Agreements and DHS requirements therein. (Trial Transcript, page 392, line 6 – page 393, line 15; Brandon Service Agreements, Plaintiffs' Exhibit 23, pages Plaintiffs'-00725-00729.)

170. No portion of 551 Sherwood is segregated for the business purpose of Incor. (Trial Transcript, page 393, lines 20-25.)

171. DHS requires that certain documents/data collection related to the services being provided to the client be kept on site with the client. (Trial Transcript, page 394, lines 1-11.)

172. Incor did not generate a chore list for 551 Sherwood. (Trial Transcript, page 394, lines 12-15.)

173. Incor does not issue keys to the HTS who work in the home at 551 Sherwood. (Trial Transcript, page 394, line 25 – page 395, line 1.)

174. To the extent possible, the clients at 551 Sherwood expressed their choices and exercised their freedom. (Trial Transcript, page 394, line 19 – page 396, line 1.)

175. Case managers are employed by the DHS to monitor the benefits and services provided by the clients. (Trial Transcript, page 399, lines 6-19.)

176. Incor does not bill for room and board, but paperwork is generated and kept internally for audit purposes. (Trial Transcript, page 401, page 25 – page 402, line 12.)

177. Guardians can request that the client's paperwork be kept outside of the house. (Trial Transcript, page 402, lines 13-21.)

178. The clients Brandon and Techau leased the property located at 551 Sherwood from Gary and Carla Dunlap for $650.00. (Lease

Agreement, Plaintiffs' Exhibit 24, pages Plaintiffs'-00738-00739.)

179. Incor is not listed as a lessee on the lease extension documents. Incor does not maintain any interest in the property located at 551 Sherwood. (Lease Agreement, Plaintiffs' Exhibit 24, pages Plaintiffs'-00738-00739.)

180. The clients retained responsibility for all aspects of home management and daily personal living with the assistance of Incor. (Brandon Service Agreement, Plaintiffs' Exhibit 23, pages Plaintiffs'-00725-00729; Techau Service Agreements, Plaintiffs' Exhibit 23, pages Plaintiffs'-00723-00724 and pages Plaintiffs'00730-00735.)

181. The lease between Brandon and Techau and the Dunlaps does not condition residency on the continuation of services provided by Incor. (Lease Agreement, Plaintiffs' Exhibit 24, pages Plaintiffs'-00738-00739.)

182. The clients each pay up to $14.00 per day for their living expenses. (Brandon Service Agreement, Plaintiffs' Exhibit 23, pages Plaintiffs'-00725-00729; Techau Service Agreements, Plaintiffs' Exhibit 23, pages Plaintiffs'-00723-00724 and pages Plaintiffs'-00730-00735.)

183. The clients paid for the monthly expenses in the home including lease payments, utilities, furnishings, and groceries from their monthly benefit checks, not to exceed $14.00 per day. The clients paid for their own clothing, toiletries, and incidentals. Incor employees assist the clients in home management and personal daily living, but the maintenance of the home was the responsibility of the clients or their guardian/representative. (Brandon Service Agreement, Plaintiffs' Exhibit 23, pages Plaintiffs'-00725-00729; Techau Service Agreements, Plaintiffs' Exhibit 23, pages

Plaintiffs'-00723-00724 and pages Plaintiffs'-00730-00735.)

184. There is not cost to the client for the services provided by Incor. (Brandon Service Agreement, Plaintiffs' Exhibit 23, pages Plaintiffs'00725-00729; Techau Service Agreements, Plaintiffs' Exhibit 23, pages Plaintiffs'-00723-00724 and pages Plaintiffs'-00730-00735.)

505 NORTH G STREET

185. Clients Smith, Ballard and Breen leased the property located at 505 North G Street, beginning October 1, 2000 from Roy Hawkins for $550.00 per month. (See, Lease Agreement, Plaintiffs' Exhibit 34, pages Plaintiffs'-01089-01091.)

186. The clients retained the responsibility for all aspects of home management and daily living needs. (See, Smith Service Agreements, Plaintiffs' Exhibit 54, pages Plaintiffs'-01528-01531; Smith Service Agreements, Plaintiffs' Exhibit 33, pages

Plaintiffs'-01073-01080; Breen Service Agreements, Plaintiffs' Exhibit 33, pages Plantiffs'-01085-01088; Ballard Service Agreement, Plaintiffs' Exhibit 60, page Plaintiffs'-01615.)

187. Incor did not obtain or retain any possessory interest in the home by virtue of the Lease Agreement. (Lease Agreement, Plaintiffs' Exhibit 34, pages Plaintiffs'-01089-01091.)

188. Clients Smith, Ballard, Breen, Wells and Rowland paid up to $14.00 per day for all living expenses in the home including lease payments, utilities, furnishings, and groceries from their monthly benefit checks. The clients paid for their own clothing, toiletries, and incidentals. Incor employees did not maintain the home or its property. Rather, the clients or someone appointed by his or her representative, was responsible for maintenance and to pay for it. (See, Smith Service Agreements,

Plaintiffs' Exhibit 54, pages Plaintiffs'-01528-01531; Smith Service Agreements, Plaintiffs' Exhibit 33, pages Plaintiffs-01073-01080; Breen Service Agreements, Plaintiffs' Exhibit 33, pages Plaintiffs'-01085-01088; Ballard Service Agreement, Plaintiffs' Exhibit 60, page Plaintiffs'-01615.)

189. There is no cost to the client for the services provided by Incor. (See, Smith Service Agreements, Plaintiffs' Exhibit 54, pages Plaintiffs'-01528-01531; Smith Service Agreements, Plaintiffs' Exhibit 33, pages Plaintiffs'-01073-01080; Breen Service Agreements, Plaintiffs' Exhibit 33, pages Plaintiffs'-01085-01088; Ballard Service Agreement, Plaintiffs' Exhibit 60, page Plaintiffs'-01615.)

190. The clients had ultimate management and control of the 505 North G Street apartment. (Trial Transcript, page 428, lines 17-20.)

191. 505 North G Street was not maintained to facilitate the provision of assistive services. (Trial Transcript, page 428, lines 21-23.)

192. The clients were responsible to pay the rent at 505 North G Street. (Trial Transcript, page 429, lines 9-10.)

193. If any of the clients dismissed Incor, they would be allowed to live at that apartment. (Trial Transcript, page 429, lines 22-24.)

194. Incor did not have any possessory right to any part of 505 North G Street. (Trial Transcript, page 430, lines 8-10.)

195. Incor did not issue keys to 505 North G Street to the HTS. (Trial Transcript, page 430, line 15 – page 431, line 2.)

196. Each client at 505 North G Street chose how their personal space was decorated. (Trial Transcript, page 430, lines 3-9.)

197. The clients at 505 North G Street owned the furniture in their apartment. (Trial Transcript, page 433, lines 19-20.)

826 S. YORK, APT. # 1B

198. Clients Joe Smith and Christie Ballard leased the property located at 826 S. York, Apt. 1B, from Sullivan Properties, beginning May 29, 2002, for $359.00 per month. (Defendants' Exhibit 35, page 0002.)

199. Incor is not listed as a lessee on the lease. (Lease Agreement, Defendants' Exhibit 35, pages 826 S. York 1B-0002.)

200. The consumers retained the responsibility for all aspects of home management and daily living needs. Smith and Ballard paid for the monthly expenses in the apartment including lease payments, utilities, furnishings and groceries from their monthly benefit checks, not to exceed $14.00 per day. Smith and Ballard paid for their own clothing, toiletries, and incidentals. (Smith Service Agreements, Plaintiffs' Exhibit 54, pages Plaintiffs'-01528-01531; Smith Service Agreements, Plaintiffs' Exhibit 33, pages Plaintiffs'-01073-01080; Ballard Service

Agreement, Plaintiffs' Exhibit 60, page Plaintiffs'-01615.)

201. The apartment complex was responsible for managing and maintaining the apartment complex. (Lease Agreement, Defendants' Exhibit 35 pages 826 S. York 1B-0001-0002, 0113.)

202. The clients and one guardian chose the 826 S. York, #1B apartment. (Trial Transcript, page 423, lines 2-17.)

203. The clients had ultimate management and control of 826 S. York, #1B. (Trial Transcript, page 424, lines 10-11.)

204. 826 S. York, #1B was not maintained primarily to facilitate the provision of assistive services. (Trial Transcript, 424, lines 12-14.)

205. The clients were responsible for paying the rent at 826 S. York, #1B. (Trial Transcript, page 425, lines 3-4.)

826 SOUTH YORK, APT. # 27B

206. Client Joe Smith leased the property located at 826 South York, Apt. 27B, from Sullivan Properties d/b/a Southpoint Apartments, beginning September 12, 2001 for $275.00 per month. (Defendants' Exhibit 35, page 0001.)

207. The client retained the responsibility for all aspects of home management and daily living needs. (Smith Service Agreements, Plaintiffs' Exhibit 54, pages Plaintiffs-01528-01531; Smith Service Agreements, Plaintiffs' Exhibit 33, pages Plaintiffs'-01073-01080.)

208. Joe Smith paid for the monthly expenses in the home including lease payments, utilities, furnishings, and groceries. Joe Smith paid for his own clothing, toiletries, and incidentals. (Smith Service Agreements, Plaintiffs' Exhibit 54, pages Plaintiffs-01528-01531; Smith Service Agreements, Plaintiffs' Exhibit 33, pages Plaintiffs'-01073-01080.)

209. Incor employees did not maintain the home or its contents. Rather, the manager of the apartment complex was responsible for maintenance and the upkeep of the unit. (Smith Service Agreements, Plaintiffs' Exhibit 54, pages Plaintiffs-01528-01531; Smith Service Agreements, Plaintiffs' Exhibit 33, pages Plaintiffs'-01073-01080.)

210. The clients selected apartment 27B at 826 S. York. (Trial Transcript, page 419, lines 10-12.)

211. The client had ultimate management and control of the 826 S. York, #27B apartment. (Trial Transcript, page 419, lines 13-15.)

212. The 826 S. York, #27B apartment was not maintained to facilitate the provision of assistive services. (Trial Transcript, page 419, lines 16-20.)

919 CHOCTAW

213. Client Bobby Creekmore leased the property located at 919 Choctaw, on December 8, 2000 from "Benny Morgan"

for $500.00 per month. (See, Rental Agreement, Plaintiffs' Exhibit 46, page Plaintiffs'-01395.)

214. The consumer retained the responsibility for all aspects of home management and daily living needs. (Creekmore Service Agreements, Plaintiffs' Exhibit 45, pages Plaintiffs'-01380-01390.)

215. The rental agreements executed between Bobby Creekmore and Benny Morgan do not condition residence on the continued provision of services by Incor. (See, Rental Agreement, Plaintiffs' Exhibit 46, page Plaintiffs'-01395.)

216. Client Creekmore paid $14.00 per day for all living expenses. Bobby Creekmore paid for the monthly expenses in the home including lease payments, utilities, furnishings, and groceries from him monthly benefit checks. Bobby Creekmore paid for his own clothing, toiletries, and incidentals. Incor employees did not maintain the

home or its property. Rather, the client or someone appointed by him or his representative was responsible for maintenance and to pay for it. (Creekmore Service Agreements, Plaintiffs' Exhibit 45, pages Plaintiffs'-01380-10390.)

217. The client bought the range and refrigerator at 919 Choctaw with his own money. (Trial Transcript, page 457, lines 19-23.)

218. The lessor, Benny Morgan, has no affiliation or relationship with Incor. (Trial Transcript, page 458, lines 13-17.)

219. The client was responsible for paying the rent at 919 Choctaw. (Trial Transcript, page 458, lines 22-24.)

220. If the client at 919 Choctaw dismissed Incor, he would still be allowed to continue living at that home. (Trial Transcript, page 459, line 14-16.)

221. The client at 919 Choctaw did not pay for his HTS services. (Trial Transcript, page 459, lines 17-19.)

222. The client at 919 Choctaw kept his own key and arranged the furniture in his home. (Trial Transcript, page 460, lines 6-9.)

223. The client at 919 Choctaw made many of his own choices. (Trial Transcript, page 461, lines 15-23.)

224. Incor had no right or possessory interest in 919 Choctaw. (Trial Transcript, page 461, line 24 – page 462, line 5.)

225. Incor did not reserve space at 919 Choctaw for Incor's business purposes. (Trial Transcript, page 462, lines 6-15.)

915 LAKELAND

226. Former Incor client Keith July leased the property located at 915 Lakeland, Checotah, Oklahoma, from Vicki Cooper, beginning May 1, 1999 for $375.00 per month. Incor is not listed as a lessee on the lease documents. (Rental Agreement,

Defendants' Exhibit 36, page 915 Lakeland-0005.)

227. Vickie Cooper was the landlord at 915 Lakeland. She is not affiliated with Incor. (Trial Transcript, page 470, line 25 – page 471, line 12.)

228. The client at 915 Lakeland dismissed Incor's services and remained at the same residence. (Trial Transcript, page 471, line 22 – page 472, line 4.)

229. Incor was not responsible for the maintenance of the dwelling at 915 Lakeland. (Rental Agreement, Defendants' Exhibit 36, page 915 Lakeland-0005.)

230. The rental agreement executed between Keith July and Vicki Cooper does not condition residency on the continued provision of services by Incor. Keith July was able to live at 915 Lakeland whether he was receiving services from Incor or not.

(Rental Agreement, Defendants'' Exhibit 36, page 915 Lakeland-0005.)

231. Keith July paid for the monthly expenses in the home including lease payments, utilities, furnishings, and groceries from his monthly benefit checks, not to exceed $14.00 per day. Keith July paid for his own clothing, toiletries, and incidentals. Incor employees did not maintain the home or its contents. Rather, the client, or someone appointed by him or his representative, was responsible for maintenance and to pay for it. (July Financial Agreement, Plaintiffs' Exhibit 23, page Plaintiffs'-00732; July Service Agreement, Plaintiffs' Exhibit 37, pages Plaintiffs'-01148-01149.)

232. Incor did not segregate any portion of 915 Lakeland for its own business purposes unrelated to the provision of services to client July. Although Mr. July's home contained a desk and fax machine, everything was maintained for the benefit

of the client. Incor did not use any part of 915 Lakeland for its own business purposes unrelated to the provision of services to the client. Keith July's desk, utilized by Incor employees, contained paperwork related to Keith July's medicine or other issues related to his care. (Trial Transcript, page 476, line 25 – page 477, line 15.)

233. Incor had no possessory interest or right to 915 Lakeland. (Trial Transcript, page 472, lines 5-14.)

234. The client was responsible for all aspects of home management and personal daily needs at 915 Lakeland. (Trial Transcript, page 472, line 20 – page 473, line 4.)

235. The client controlled who came and went from the 915 Lakeland property. (Trial Transcript, page 473, lines 8-10.)

236. The client at 915 Lakeland was responsible to pay for his essential items. (Trial Transcript, page 474, line 25 – page 475, line 13.)

237. Incor did not generate a chore list for the 915 Lakeland property. (Trial Transcript, page 477, line 25 – 478, line 3.)

300 NORTH 40TH

238. Client Keith Moore leased the property located 300 N. 40th. Mr. Moore lived in that apartment prior to receiving Incor services. (Lease Termination Letter, Defendants' Exhibit 38, page 300 N. 40th-1123.)

239. The property was leased by Honor Heights Tower. (Lease Termination Letter, Defendants' Exhibit 38, page 300 N. 40th-1123.)

240. The client retained the responsibility for all aspects of home management and daily living needs. Keith Moore paid for the monthly expenses in the home including lease payments, utilities, furnishings, and groceries. Keith Moore paid for his own clothing, toiletries, and incidentals. Incor employees did not maintain the home or its contents. Rather, the client, or someone

appointed by him or his representative, was responsible for maintenance and to pay for it. (Service Agreement, Plaintiffs' Exhibit 50, pages Plaintiffs'-01489-01492.)

241. The client at 300 North 40th Street was living at that address before he hired Incor to provide services to him. (Trial Transcript, page 498, lines 18-20.)

242. Incor took over services from another provider at the 300 North 40th Street address. (Trial Transcript, page 498, lines 21-25.)

243. The apartment at 300 North 40th Street was leased by the Muskogee Housing Authority which has no affiliation with Incor. (Trial Transcript, page 499, lines 7-17.)

244. The client at 300 North 40th Street had ultimate control of his living space. (Trial Transcript, page 499, lines 22-24; Service Agreement, Plaintiffs' Exhibit 50, pages Plaintiffs'-01489-01492.)

245. The client at 300 North 40th Street could express his choices. (Trial Transcript, page 499, line 25 – page 500, line 2.)

246. The apartment at 300 North 40th Street was not maintained so that the client could receive HTS services, but rather as his home. (Trial Transcript, page 500, lines 3-6.)

247. The client at 300 North 40th Street pays the rent from his own checkbook. (Trial Transcript, page 500, lines 12-17.)

248. The client at 300 North 40th Street pays his own utilities. (Trial Transcript, page 501, lines 19-20.)

249. Incor did not condition the provision of services to the client at 300 North 40th Street on continued occupancy of that residence. (Trial Transcript, page 501, line 24 – page 502, line 10.)

250. The client at 300 North 40th Street does not pay for his HTS services. (Trial Transcript, page 502, lines 16-18.)

251. Incor did not issue keys to the HTS staff working at 300 North 40th Street. (Trial Transcript page 502, lines 19-24.)

252. When the client at 300 North 40th Street retained Incor, he did not have a guardian. (Trial Transcript, page 505, lines 10-11.)

253. Incor does not own any property at the 300 North 40th Street apartment, nor does it direct HTS staff where to fill out their paperwork. (Trial Transcript, page 505, line 22 – page 506, line 4.)

254. Apartment from his lock box for his medications, the client at 300 North 40th Street was given complete access to his house and the contents. (Trial Transcript, page 506, lines 7-17.)

255. The client at 300 North 40th Street attended and participated in his IP meetings. (Trial Transcript, page 510, lines 8-12.)

200 E. MONROE, D2

256. Former Incor client Joe Smith leased the property located at 200 E. Monroe D2 beginning February 3, 1999 from Cherokee Hills Apartments. The client, Joe Smith, lease the home from Cherokee Hills Apartments for $275.00 per month. (Defendants' Exhibit 33, page East Monroe, D2-0006.)

257. The client retained the responsibility for all aspects of home management and personal daily living needs. (Smith Financial Agreements, Plaintiffs' Exhibit 33, pages Plaintiffs'-01073-01080.)

258. The rental agreement executed between Joe Smith and Cherokee Hills Apartments does not condition residency on the continued provision of services by Incor. (Defendants' Exhibit 33, page East Monroe, D2-0006.)

259. Incor did not segregate any portion of 200 E. Monroe D2 for its own business purposes

unrelated to the provision of services to client Smith. (Trial Transcript, page 415, lines 14-19.)

260. Joe Smith paid for the monthly expenses in the home including lease payments, utilities, furnishings, and groceries from his monthly benefit checks. Joe Smith paid for his own clothing, toiletries, and incidentals. Incor employees did not maintain the home or its contents. Rather, the client, or someone appointed by him or his representative, was responsible for maintenance and to pay for it. (Service Agreements, Plaintiffs' Exhibit 54, pages 01528-01531.)

261. The apartment is privately owned by Cherokee Hills Apartment. Accordingly, should the client elect to receive services from another provider, or have services cancelled altogether, that decision would not impact the continued residence of the

client at 200 Monroe, D2. (Defendants' Exhibit 33, page East Monroe, D2-0006.)

262. 200 East Monroe is owned by the Cherokee Hills Apartments. (Trial Transcript, page 411, lines 6-13.)

263. The client at 200 East Monroe is capable of making his own decisions and selected Incor. (Trial Transcript, page 411, lines 16-19.)

264. The client had ultimate management control of the 200 East Monroe, D2 apartment. (Trial Transcript, page 412, lines 3-5; Service Agreements, Plaintiffs' Exhibit 54, pages Plaintiffs'-01528-01531.)

265. The 200 East Monroe apartment was not maintained to facilitate the provision of assisted services to the client. (Trial Transcript, page 412, lines 6-8.)

266. The 200 East Monroe apartment was paid for consistent with the client's Service Agreement and with the client's money. (Trial Transcript, page 412, lines 11-21;

Service Agreements, Plaintiffs' Exhibit 54, pages Plaintiffs'-01528-01531.)

267. The Service Agreement and government benefits for the client at 200 E. Monroe are different because he was not part of the Hissom class. (Trial Transcript, page 413, lines 7-24; Service Agreements, Plaintiffs' Exhibit 54, pages Plaintiffs'-01528-01531.)

268. Had the client, Joe Smith, discontinued services with Incor, he would have been allowed to stay in the 200 East Monroe apartment. (Trial Transcript, page 415, lines 1-3.)

269. Incor did not reserve space for its own business purpose at 200 East Monroe, D2. (Trial Transcript, page 415, lines 14-19.)

270. Apart from his medication lock box, there is not portion of 200 East Monroe or its contents that Joe Smith was unable to access. (Trial Transcript, page 416, lines 5-7.)

271. At 200 East Monroe, D2, the client controlled who could enter his apartment, how his home was decorated, and decided when and what to eat. (Trial Transcript, page 416, line 22 – page 417, line 4.)

272. Incor had no possessory interest in the 200 East Monroe, D2 apartment. (Trial Transcript, page 422, lines 13-14.)

925 CALLIE

273. At trial, the parties agreed that no overtime was registered at 925 Callie during the applicable statute of limitation. (Trial Transcript, page 512, line 18 – page 513, line 9.) Therefore the Court received no evidence concerning the private home status of 925 Callie.

321 NORTH 15TH.

274. The clients living at 321 North 15th were Christie Ballard, Rhonda Capps and Tiffany Thomas. (Trial Transcript page 515, lines 11-23.)

275. 321 North 15th was leased from Lester Beasley. (Trial Transcript, page 519, lines 5-9; Defendants' Exhibit 51, page 0003.)

276. Mr. Beasley has no affiliation whatsoever with Incor. (Trial Transcript, page 519, lines 10-12.)

277. Incor had Service Agreements in place for all of the clients living at 321 North 15th. (Defendants' Exhibit 51, pages 0004-0008.)

278. The Service Agreements dictated what services were provided each client and how the clients' money could be utilized. (Defendants' Exhibit 51, pages 0004-0008.)

279. The clients wee in control of 321 North 15th Street. (Trial Transcript, page 519, lines 23-24.)

280. The home at 321 North 15th Street was not maintained so that the clients could receive HTS services. (Trial Transcript, page 519, line 25 – page 520, line 4.)

281. Nothing in the clients' Lease Agreement at 321 North 15th would prevent the clients'

continued residence in that home if they were no longer receiving services from Incor. (Trial Transcript, page 520, lines 10-15.)

282. The clients at 321 North 15th did not pay anything for the HTS services they received. (Trial Transcript, page 520, lines 16-17).

283. Incor does not reserve any part of 321 North 15th for Incor's use. (Trial Transcript, page 521, lines 2-4.)

284. Incor did not own a desk or file cabinet or other furniture at 321 North 15th. (Trial Transcript, page 12. If clients request that the paperwork be removed from their homes, those requests are met. (Trial Transcript, page 521, line 20 – page 522, line 1.)

285. 321 North 15th was decorated to the choices made by the clients. (Trial Transcript, page 522, lines 4-5.)

286. The clients/guardians controlled who was allowed to enter the home at 321 North 15th. (Trial Transcript, page 522, lines 16-22.)

20% RULE FOR ALL DWELLING UNITS DETERMINED TO BE PRIVATE HOUSES

FACTS COMMON TO ALL PLAINTIFFS

287. To the extent possible, Incor's clients were to perform or be trained to perform, general household work. (Trial Transcript, page 201, lines 2-13.)

288. By encouraging the client to perform or participate as much as possible in general household work, the HTS provides the client with a positive training experience. (Trial Transcript, page 201, line 8 – page 202, line 8.)

289. In the event the HTS were to perform household tasks that the client was able to perform, the client would receive negative training and the HTS would not be performing their job. (Trial Transcript, page 201 line 20 – page 202, line 14.)

290. HTS receive specific training, ETL, that helps the HTS to design strategies around a client's specific negative behaviors. (Trial Transcript, page 202, lines 1-22.)

291. HTS do not receive training on how to perform housework. (Trial Transcript, page 202, line 23 – page 203, line 2.)

292. Incor's Job Description for a Habilitation Training Specialist does not include the responsibility of doing housework.[10] (Trial

---

[10] HTS Job Descriptions for: Cody Fowler, Plaintiffs' Exhibit 161, pages Plaintiffs'-05634-05635; Larry Burris, Plaintiffs' Exhibit 162, pages Plaintiffs'-05645-05646; Michael Leach, Plaintiffs' Exhibit 163, pages Plaintiffs'-05671-05672; Bettie Burnett, Plaintiffs' Exhibit 167, pages Plaintiffs'-05775-05776; Lisa Smith, Plaintiffs' Exhibit 168, pages Plaintiffs'-05 Defendants' Exhibit 47, pages 810-05813; Alice Smith, Plaintiffs' Exhibit 169, pages Plaintiffs'-05850-05851; Lesa Horney, Plaintiffs' Exhibit 172, pages Plaintiffs'-05884-05885; Kenya Washington, Plaintiffs' Exhibit 175, pages Plaintiffs'-06012-06013; Yolanda White, Plaintiffs' Exhibit 176, pages Plaintiffs'-06035-06036; Angela McVay, Plaintiffs' Exhibit 177, pages Plaintifs'-06045-06046; Wahkeetha Atkeson, Plaintiffs' Exhibit 178, pages Plaintiffs'-06050-06051; Angela Miller, Plaintiffs' Exhibit 180, pages Plaintiffs'-06092-06093; Ruby McGee, Plaintiffs' Exhibit 181, pages Plaintiffs'-06101-06102; Carmen Kirkland, Plaintiffs' Exhibit 182, pages Plaintiffs'-06126-06127; Anntonett Taylor, Plaintiffs' Exhibit 183, pages Plaintiffs'-06146-06147; Deloris Wilson, Plaintiffs' Exhibit 184, pages Plaintiffs'-06157-06158; Cynthia Whitfield, Plaintiffs'

Transcript, 203, lines 3-5; se also relevant HTS Job Descriptions, Footnote 6.)

293. The standard is to assist the client in keeping the home in the same state of cleanliness as any other individual's home. (Trial Transcript, page 394, line 16-18.)

294. The home is not kept sanitary, as if an institution. (Trial Transcript, page 394, lines 16-24.)

295. HTS accompany their clients on activities and the associated costs are paid through the client's room and board. Trial Transcript, page 254, line 11 – page 255, line 9.)

296. While the clients are out of their homes, HTS are not there performing household chores

---

Exhibit 190, pages Plaintiffs'-06344-06345; Judy Blackmer, Plaintiffs' Exhibit 193, pages Plaintiffs'-06386-06387; Lajoya Davis, Plaintiffs' Exhibit 194, pages Plaintiffs'-06392-06393; Leceif Spring, Plaintiffs' Exhibit 195, pages Plantiffs'-06414-06415; Sherry Gardenhire, Plaintiffs' Exhibit 198, pages Plaintiffs'-06564-06565; Stephanie Newman, Plaintiffs' Exhibit 199, pages Plaintiffs'-06590-06591.

or general maintenance. (Trial Transcript, page 259, lines 1-5.)

297. DHS does not have a standard of cleanliness for the client's home that Incor was required to follow. Trial Transcript, page 278, lines 14-16.)

298. The HTS were to train/assist the client with household chores when those tasks were warranted, not as routine. (Trial Transcript, page 278, lines 5-25.)

299. The paperwork and notebooks that record the client's daily activities are required by the Department of Human Services. (Trial Transcript, page 641, lines 17-21.)

300. No Plaintiff has attempted to reconstruct through contemporaneous time records the amount of housework that he or she performed while serving as an HTS, whether the housework was related to the client or general in nature.

301. The paperwork required or an HTS requires between ten and 15 minutes per shift. (Trial

Transcript, page 1205, lines 13-19; Trial Transcript, page 1242, line 20-page 1243, line 3.)

302. Performing cleaning for the client will not teach them the everyday skills of living. (Trial Transcript, page 1211, lines 8-14).

303. The client's I.P. spells out the client's goals. (Trial Transcript, page 1212, lines 4-15).

304. The documentation prepared by the HTS was necessary for continuity of the client's care. (Trial Transcript, page 1222, lines 16-23.)

305. If the HTS timesheets do not demonstrate HTS service being provided to the client, the client's service may be curtailed by the DHS. (Trial Transcript, page 1222, line 24-page1223, line 11; Trial Transcript, page 1253, line 7-page 1254, line 4).

306. The vast majority of documentation prepared by the HTS is reasonably related to providing for the care, well-being, safety

and training of the client. (Trial Transcript, page 1244, lines 17-20.)[11]

307. All activities in the client's home are designed to train, protect, or care for the client. (Trial Transcript, page 1245, lines 18-23).

308. DHS does not have a standard of cleanliness for the client's homes. (Trial Transcript, page 1251, lines 14-19.)

309. Incor's management has not generated a chore list for any of the clients' homes. (Trial Transcript, page 1252, lines 1-3.)

310. Job duties of the HTS and House Manager are not designed to encompass three to four hours of paperwork per shift. (Trial Transcript, pages 1252, lines 11-22).

---

[11] A cogent argument can be made that the documentation involving HTS timesheets and mileage may not fit this description. Time spent on such tasks, however, has not been individually calculated and is *de minimus* in any event. See Conclusion of Law, ¶ 43-44 and footnote 15, infra.

311. HTS does not receive training on how to do household chores. (Trial Transcript, page 1254, lines 19-25).

312. Any general household work listed in the client's I.P. under a "Schedule of Events" was a guideline prepared by DHS Case Manager and not a schedule for each shift. (Trial Transcript, page 276, line 24-page 278, line 13).

FACTS RELATING TO CLAIMS BY SPECIFIC PLAINTIFFS

MICHAEL LEACH

313. Plaintiff Michael Leach began his employment at Incor in August of 2001 and left employ at Incor on July 16, 2002. (Trial Transcript, page 624, lines 23-25.)

314. The Court found Leach to be both knowledgeable and credible.

315. Plaintiff Leach had held various positions at Incor, including vocational training specialist, habilitation training specialist and house manager. He indicated that

the role of a HTS is to teach and protect and care for the needs of the client. (Trial Transcript, page 610, line 1-page 611, line 11; page 630, lines 4-6; page 633, line 4-9.)

316. Plaintiff Leach's job duties as an HTS included training clients in personal hygiene, budgeting, money management, cooking, exercising, weekly menus, shopping lists, leisure skills and all other activities of daily living. In addition, Plaintiff Leach monitored the client's well-being and safety. (Trial Transcript, page 620, line 25-page 621, line 12; page 621, lines 13-25; page 628, lines 3-14.)

317. Plaintiff Leach also fulfilled the role of house manager during his employment with Incor. That job entailed the same responsibilities as an HTS, but with a few added administrative duties. However, the goal in all of these positions was to teach and protect the client. (Trial Transcript,

page 625, lines 1-4; page 631, page 5-page 632, line 4.)

318. The goal in training is to train the client to be as independent as possible. (Trial Transcript, page 646, lines 9-11.)

319. Plaintiff Leach provided supportive living services to David Webb at Mr. Webb's home located at 520 S. Maple. Mr. Leach agreed that Mr. Webb's house is owned by Mr. Webb's brother and that Mr. Webb lived in that house before receiving HTS services from Incor.

320. Plaintiff Leach followed the duties listed on the Habilitation Training Specialist job description. (Trial Transcript, page 625, lines 19-20; Leach's Job Description, Plaintiff's Exhibit 163, pages Plaintiffs'-05671-05672.)

321. The paperwork and notebooks that record the client's daily activities are required by the Department of Human Services. (Trial Transcript, page 641, lines 17-22.)

CODY FOWLER

322. Plaintiff Cody Fowler's job duties include training clients in personal hygiene, budgeting, money management, cooking, exercising, weekly menus, shopping lists, leisure skills and all other activities of daily living. In Addition, Plaintiff Cody Fowler monitored the client's well-being and safety. (Trial Transcript, page 655, line 24-page 656, line 15.)

323. The Court found Cody Fowler to be combative, evasive and not particularity credible. He contradicted his deposition testimony.

324. Plaintiff Cody Fowler trained his clients to the extent possible. (Trial Transcript, page 656, lines 21-25.)

325. Plaintiff Cody Fowler followed the duties listed on the Habilitation Training Specialist job description. (Cody Fowler HTS Job Description, Plaintiffs' Exhibit 161, pages Plaintiffs'-05586-05588.)

326. If the client required 24-hour case, Plaintiff Cody Fowler was there for the client's care, protection and fellowship. (Trial Transcript, page 665, page 14-20.)

327. Plaintiff Cody Fowler's goals at all times were to assist the client in training him. (Trial Transcript, page 669, lines 14-16.)

328. It is possible that within the mandates of the HTS job description, he would be called upon to do household chores. (Trial Transcript, page 670, lines 12-15.)

329. Plaintiff Cody Fowler's main goal was to spend 100 percent of his time as an HTS training his client. (Trial Transcript, page 672, page 20-23.)

BRUCE McCARTHY

330. Plaintiff Bruce McCarthy's job duties included training clients in personal hygiene, budgeting, money management, cooking, exercising, weekly menus, shopping lists, leisure skills and all other activities of daily living. In addition, Plaintiff

Bruce McCarthy monitored the client's well-being and safety. (Trial Transcript, page 701. lines 2-5.)

331. The Court observed that McCarthy appeared to take his duties seriously and was an excellent HTS.

332. Plaintiff McCarthy followed the duties listed on the Habilitation Training Specialist job description. (Trial Transcript, page 698, lines 12-17.)

333. Plaintiff McCarthy's goal of an HTS was to teach the developmentally disabled the everyday skills of living. (Trial Transcript, page 698, line 18-page 699, line 14.)

334. In addition to teaching the developmentally disabled, another function of the HTS is to protect the clients. (Trial Transcript, page 700, line 8-15.)

335. A substantial portion of Plaintiff McCarthy's time as an HTS in Mr. Webb's house was spent teaching him everyday skills of living. It was his goal to make the client's life as

normal as possible. (Trial Transcript, page 701, line 2-8.)

336. The data books that he filled out were all related to the client's benefit. (Trial Transcript, page 705, lines 11-17; page 706, line 7-24.)

337. All of the activities that went on in the house were training or safety goals for David Webb's benefit. (Trial Transcript, page 701, line 11-17.)

338. Plaintiff McCarthy agrees that the documentation was done for Mr. Webb's benefit. (Trial Transcript, page 706, line 7-9.)

339. Plaintiff McCarthy has not tried to reconstruct or recreate his time to give a better estimate of what he did on a daily basis. (Trial Transcript, page 708, lines 5-12.)

ANNTONETT TAYLOR

340. Plaintiff Anntonett Taylor worked as an HTS in the Beaird home. (Trial Transcript, page 711, lines 11-13).

341. The Court observed that Taylor was not particularly credible. She contradicted her deposition testimony. Her deposition errata sheet contained numerous corrections.

342. Plaintiff Taylor's job duties include training clients in personal hygiene, budgeting, money management, cooking, exercising, weekly menus, shopping lists, leisure skills and all other Activities of Daily living. In addition, Plaintiff Taylor monitored the clients well-being and safety and assisting them in getting around in the community. (Trial Transcript, page 719, line 12-24.)

343. Plaintiff Taylor was in the home to take care of Rita Beaird. (Trial Transcript, page 716, line 13-15.)

344. Plaintiff Taylor followed the duties listed on the Habilitation Training Specialist job description; she provided such training, monitoring and fellowship to client Rita Beaird at the West Indianola house in

Checotah. (Trial Transcript, page 719, lines 12-24; Plaintiffs' Exhibit 183, pages Plaintiffs'-06146-Plaintiffs'-06147.)

345. Plaintiff Taylor acknowledged that part of being an HTS is to provide fellowship for her client. (Trial Transcript, page 717, lines 1-3.)

346. Plaintiff Taylor helped with personal hygiene, cleaning, and assisted her client with the restroom. (Trial Transcript, page 719, lines 19-24.)

JUDY BLACKMER

347. Plaintiff Judy Blackmer's job duties included training Rita Beaird in items such as personal hygiene, budgeting, money management, cooking, exercising, weekly menus, shopping lists, leisure skills and all other Activities of Daily living. In addition, Plaintiff Blackmer monitored the client's well-being and safety in the home and in the community. (Trial Transcript, page 735, lines 2-16.)

348. The Court observed that Blackmer's testimony was somewhat contradictory and often not credible. She contradicted her deposition testimony.

349. Rita Beaird demands a great deal of attention and is profoundly disabled. (Trial Transcript, page 733, lines 7-25.)

350. Plaintiff Blackmer followed the duties listed on the Habilitation Training Specialist job description. (Trial Transcript, page 734, lines 9-16; page 743, lines 16-18; Plaintiffs' Exhibit 193, pages Plaintiffs'-06386-Plaintiffs'-06387.)

351. Plaintiff Blackmer was responsible for training and safety of the clients, and that was of paramount importance to her. Plaintiff Blackmer spent all of her time on these goals. (Trial Transcript, page 736, lines 13-25.) (emphasis added.)

352. Plaintiff Blackmer provided such training and monitoring to client Rita Baeird at 710

Indianola. (Trial Transcript, page 732, line 21-22.)

353. Plaintiff Blackmer acknowledged that she was successful in training her client to better feed herself. (Trial Transcript, page 740, lines 24-25.)

STEPHANIE NEWMAN

354. During her employment with Incor, Plaintiff Stephanie Newman worked as an Habilitation Training Specialist ("HTS"). (Trial Transcript, page 744, line 12-13.)

355. The Court observed that Newman was relatively credible.

356. Plaintiff Newman's job as an HTS was to normalize the life of the clients. (Trial Transcript, page 751, 17-19.)

357. Plaintiff Newman followed the duties listed on the Habilitation Training Specialist job description. (Trial Transcript, page 751, lines 23-24; Plaintiffs' Exhibit 199, pages Plaintiffs'-06590-Plaintiffs'-06591.)

358. Plaintiff Newman acknowledged that if a chore did not get done by the clients, then it would be the job of the HTS to do it for the health and safety of the clients. (Trial Transcript, page 753, lines 8-12.)

359. Plaintiff Newman agreed that keeping count of the medication was for the health and safety of the client. (Trial Transcript, page 756, lines 7-9.)

360. Plaintiff Newman agreed that the paperwork is related to the care, training and safety of the client. (Trial Transcript, page 756, lines 12-15.)

ROSEOLA THORNBURG

361. Plaintiff Roseola Thornburg was employed at Incor as an HTS and a House Manager. (Trial Transcript, page 759, line 23-page 760, line 1.)

362. Thornburg had some credibility problems. For example, her estimated time percentage that she assigned to various

tasks were very inconsistent. If added together, they equaled 130%.

363. Plaintiff Thornburg, on a day-to-day basis, would mostly train in safety issues and try to train the client to do some housecleaning. (Trial Transcript, page 760, lines 2-10.)

364. Plaintiff Thornburg was successful in training her client to make his own bed. (Trial Transcript, page 761, line 21-page 762, line 1.)

365. Plaintiff Thornburg's responsibility as an HTS was to assist her client, guide him, care for and provide protection. (Trial Transcript, page 769, lines 20-24.)

366. Plaintiff Thornburg agreed that every activity that goes on in the house is related to the care, protection, safety or training of the client. (Trial Transcript, page 771, line 1-6.)

367. Plaintiff Thornburg agreed that the paperwork that's involved in providing HTS services deals with the care, protection,

training and safety of the client. (Trial Transcript, page 771, line 7-11.)

368. Since 2000, Plaintiff Thornburg provided such training and monitoring to client Joe Smith at the house on Monroe Street in Tahlequah and at the house on York Street in Muskogee. (Trial Transcript, page 760, lines 2-10).

369. Plaintiff Thornburg has not tried to reconstruct or recreate her time to give a better estimate of what she did on a daily basis. (Trial Transcript, page 773, line 8-14.)

370. Plaintiff Thornburg complained to the Department of Labor after she left Incor in January of 2002, and the Department informed her that she was not entitled to overtime compensation. (Trial Transcript, page 772, lines 21-25.)

CHRISTINE LANE-HUCKABY

371. Plaintiff Christine Lane-Huckaby started working at Incor on April 18, 2000, and continued to work at Incor until October 3,

2002. (Trial Transcript, page 781, line 25-page 782, line 2.)

372. Plaintiff Huckabay was very credible and seemed to be an excellent HTS.

373. During her employment with Incor, she worked as an Habilitation Training Specialist ("HTS") at 505 Judy Lane. (Trial Transcript, page 775, lines 23-page 776, line 2).

374. The clients at 505 Judy Lane are profoundly disabled. (Trial Transcript, page 777, page 13-15; page 782, lines 14-16.)

375. Plaintiff Huckabay testified that about ten percent of her shift would be taken up with paperwork. (Trial Transcript, page 780, lines 16-20.)

376. Plaintiff Huckabay's job duties include training clients in personal hygiene, providing assistance in budgeting and financial matters. (Trial Transcript, page 782, lines 6-13.)

377. Plaintiff Huckabay followed the duties listed on the Habilitation Training Specialist job description. (Trial Transcript, page 782, lines 3-5.)

378. As an HTS, she agreed that providing care and protection was a big part of her job. (Trial Transcript, page 782, lines 17-19.)

379. At the 505 Judy Lane house, Plaintiff Huckabay was providing care and protection more than she was training. (Trial Transcript, page 782, lines 20-24.)

380. Plaintiff Huckabay testified that all of the documentation was for the benefit of the clients. (Trial Transcript, page 783, line 23 – page 784, line 6.)

381. Plaintiff Huckabay has not tried to reconstruct or recreate her time to give a better estimate of what she did on a daily basis. (Trial Transcript, page 784, lines 7-11.)

YOLANDA WHITE

382. Plaintiff Yolanda White started working at Incor on April 4, 2002, and continued to

work at Incor until October 11, 2002. (Trial Transcript, page 796, lines 23 – 797, line 1.)

383. Plaintiff White was very credible and seemed to be an excellent THS.

384. During her employment with Incor, Plaintiff White worked as an Habilitation Training Specialists ("HTS") and house manager. The house manager's job responsibilities were essentially the same as the HTS, except the house manager had a few administrative duties. (Trial Transcript, page 786, lines 19-24.)

385. Plaintiff White provided services to client, Keith More at 300 North 40th, Apartment 501. (Trial Transcript, page 787, line 24 – page 788, line 5.)

386. Plaintiff White agreed that the primary focus of the job description is to train the client and provide safety, which includes a sanitary living condition. (Trial Transcript, page 798, lines 12-21.)

387. Plaintiff White followed the duties listed on the Habilitation Training Specialist job description and provided those services to her client. (Trial Transcript, page 797, lines 2-8; Plaintiffs' Exhibit 176, page Plaintiffs' -06035 – Plaintiffs' -06036.)

388. Plaintiff White agreed that one of the goals of the program was to normalize the client's life to the extent possible. (Trial Transcript, page 797, lines 17-23.)

389. Plaintiff White's client, Mr. Moore was capable of receiving some training. (Trial Transcript, page 799, lines 5-7.)

LARRY BURRIS

390. Plaintiff Larry Burris was employed by Incor between March 30, 2001 and March 1, 2003, as a Habilitation Training Specialists. (Trial Transcript, page 817, lines 18-20.)

391. To the Court, Plaintiff Burris appeared stern and resentful. One wonders how effective he was in his duties as an HTS. His testimony was at times inconsistent.

392. Plaintiff Burris worked at the James Duty house at 901 Erie, and the Joe Smith house on York Street, Apartment 27B, while employed at Incor. (Trial Transcript, page 808, lines 4-20.)

393. Plaintiff Burris also worked with Mr. Harrison at 901 Erie. (Trial Transcript, page 809, lines 11-16.)

394. As a House Manager, Plaintiff Burris trained the individuals, saw that the schedules got out and ensured that the staff was on time and did their jobs. (Trial Transcript, page 809, lines 19-24.)

395. Plaintiff Burris would train Mr. Smith by showing him how to clean the house, clean up and how to budget. (Trial Transcript, page 809, line 25 – page 810, line 8.)

396. Plaintiff Burris attempted to teach Mr. Smith how to clean the bathroom. (Trial Transcript, page 811, lines 15-16.) He also attempted to teach Mr. Smith how to

clean the kitchen. (Trial Transcript, page 813, lines 6-8.)

397. It was Plaintiff Burris' job to make sure Mr. Smith's room was clean. (Trial Transcript, page 813, lines 15-21.)

398. Plaintiff Burris followed the duties listed on the Habilitation Training Specialists job description. He recalls signing the job description. (Trial Transcript, page 817, lines 21-22; Plaintiffs' Exhibit 162, pages Plaintiffs' -05645-05646.)

399. Plaintiff Burris agreed that it was his job to provide the guidance his clients needed to be trained to do things by themselves. (Trial Transcript, page 819, lines 23-25.)

400. For his clients' safety and protection, Plaintiff Burris would do the dishes. (Trial Transcript, page 821, lines 3-5.)

401. One hundred percent of Plaintiff Burris's job as an HTS was to train his clients. (Trial Transcript, page 821, lines 20-25.)

402. Plaintiff Burris agrees that the paperwork that was done in the house was for the care, benefit and protection of the clients. (Trial Transcript, page 822, lines 8-12.)

SONJA JULY

403. Plaintiff Sonja July worked at 915 Lakeland for Keith July who was her brother. (Trial Transcript, page 824, lines 16-20.)

404. The Court observed that Plaintiff July tried to be more of an advocate than a witness. She definitely knew and understood why she was testifying (compared to many Plaintiffs). Nevertheless, her "axe-grinder" attitude adversely affected her credibility.

405. Plaintiff July followed the duties listed on the Habilitation Training Specialist job description; she provided such training and monitoring to client Keith July at 915 Lakeland house. (Trial Transcript, page 824, lines 16-17; page 838, line 9 – page 839, line 2.)

406. Plaintiff July agrees that if the client did not want to do a chore, and if it involved the client's safety, then the HTS should take care of it. (Trial Transcript, page 835, lines 16-21.)

407. Plaintiff July has reviewed the HTS job description. She did her best to fulfill those job responsibilities. (Trial Transcript, page 838, lines 9-23.)

408. Plaintiff July acknowledged that the primary goals as a THS are training and protection. (Trial Transcript, page 838, line 24 – page 839, line 2.)

409. Plaintiff July agrees that the goal of an HTS is to make the client's life as normal as possible. (Trial Transcript, 843, lines 1-6.)

KATHERINE CARROLL

410. Plaintiff Katherine Carroll works at the 505 Judy Lane house. (Trial Transcript, page 846, lines 7-9.)

411. Plaintiff Carroll seemed quite credible.

412. During her employment with Incor, she worked as an Habilitation Training Specialist ("HTS".) Plaintiff Carroll's job duties include bathing her clients, taking care of their daily needs, brushing their teeth and hair, playing with the clients, preparing meals and cleaning. (Trial Transcript, page 846, lines 14-20.)

413. The clients at 505 Judy Lane are not able to be trained in general household cleaning (Trial Transcript, page 847, lines 18-20.)

414. Plaintiff Carroll took the clients out in the community. (Trial Transcript, page 856, lines 6-10.)

415. Plaintiff Carroll stated that all the HTS shared in the responsibility of general household cleaning. (Trial Transcript, page 847, lines, 21-24.)

416. Plaintiff Carroll agreed that everything that was done in the house was done by the HTS. She was not doing anything that the

clients could have done for themselves. (Trial Transcript 16-22.)

417. Plaintiff Carroll agreed that the documentation done in the house was done for the clients' benefit and most of the documentation was for the clients and their progress.) (Trial Transcript, page 857, line 23 – page 858, line 6.)

418. Plaintiff Carroll has not tried to reconstruct or recreate her time to give a better estimate of what she did on a daily basis. (Trial Transcript, page 859, lines 16-18.)

BETTIE BURNETT

419. Plaintiff Bettie Burnett started working at Incor on June 12, 2001, and continues to work at Incor as an HTS. (Trial Transcript, page 869, line 25 – 870, line 5.)

420. Plaintiff Burnett was relatively credible.

421. Plaintiff Burnett works at the 505 Judy Lane House. (Trial Transcript, page 873, lines 6-9.)

422. Plaintiff Burnett agrees that one of the goals of the residential program is to

normalize the lives of the clients and to teach the clients to live as independently as possible. (Trial Transcript, page 877, lines 2-9.)

423. Plaintiff Burnett followed the duties listed on the Habilitation Training Specialist job description. She recalls reading and signing it when she began her employment at Incor. (Trial Transcript, page 877, lines 10-17; Plaintiffs' Exhibit 167, pages Plaintiffs'-05775-05776.)

424. Plaintiff Smith "did her best" to spend one-hundred percent (100%) of time trying to accomplish the goals and job duties as outlined on the job description. She cannot think of any time she wasn't trying to accomplish to the goals of an HTS. (Trial Transcript, page 878, lines 13-22.)

425. Plaintiff Burnett agreed that the documentation she performed was for the clients' benefit. (Trial Transcript, page 878, line 23 – page 879, line 5.)

426. Plaintiff Burnett agreed that the clients in the 505 Judy Lane house could not do household chores and that where the HTS were to step in and help out. (Trial Transcript, page 879, line 22 – page 880, line 5.)

427. Plaintiff Burnett has not tried to reconstruct or recreate her time to give a better estimate of what she did on a daily basis. (Trial Transcript, page 880, lines 18-25.)

CARMEN KIRKLAND

428. During her employment with Incor, Plaintiff Carmen Kirkland worked as an Habilitation Training Specialist ("HTS"). She worked with Joe Smith, Christie Ballard and Jamie Breen at the 505 North G Street house. (Trial Transcript, page 882, lines 19-22.)

429. Plaintiff Kirkland was relatively credible.

430. Plaintiff Kirkland's job duties included mainly training the individuals for everyday living and for them to be able to just be more productive and independent

people. "It was mainly just to be there with them and make sure they were okay and safe." She attempted to train them to cook, clean their house, to be more sociable with other people and keep them entertained. (Trial Transcript, page 883, lines 1-14.)

431. Plaintiff Kirkland read and signed the Habilitation Training Specialist job description. (Trial Transcript, page 891, lines 8-12; Plaintiffs' Exhibit 182. Pages Plaintiffs' 06126-06127.)

432. Plaintiff Kirkland agrees that every activity in the home relates to the clients. She also agrees that the paperwork that she performs in the home relates to the clients. (Trial Transcript, page 891, line 18-24.)

ANGELA MILLER

433. Plaintiff Angela Miller read and signed the Habilitation Training Specialist job description. (Trial Transcript, page 901, line 24 – 902, line 7.)

434. Plaintiff Miller was not particularly credible.

435. Plaintiff Miller provided HTS services to client Bobby Creekmore at the 919 Choctaw house. (Trial Transcript, page 896, line 5-16.)

436. Plaintiff Miller agrees that one of the goals for the residential program is to normalize the client's life and to teach the clients to live independently. (Trial Transcript, page 901, lines 17-23.)

437. Plaintiff Miller did not perform tasks that were not necessary to help her client. (Trial Transcript, page 904, lines 2-4.)

438. Plaintiff Miller agrees that as an HTS, she was spending one-hundred percent of her time trying to accomplish the goals and duties as outlined on the job description. (Trial Transcript, page 904, lines 5-8.)

439. Plaintiff Miller agrees that the documentation was done for her client's benefit. (Trial Transcript, page 904, lines 9-12.)

440. Plaintiff Millers has not tried to reconstruct how much time she spent doing documentation and housework. (Trial Transcript, page 905, lines 5-13.)

JORETTA TRUITT

441. Plaintiff Joretta Truitt worked as an HTS in the 505 Judy Lane house. (Trial Transcript, page 907, lines 14-18.)

442. Plaintiff Truitt appeared to be "axe-grinder" and this adversely affected her credibility.

443. Plaintiff Truitt testified that some of her duties included making the clients breakfast, help feed them, dress them, clean up the dishes, and have them ready to go for their day program. (Trial Transcript, page 910, line 22 – page 911, page 7.)

444. Plaintiff Truitt read and signed her job description. (Trial Transcript, page 913, lines 11-13.)

445. Plaintiff Truitt stated the house had to be spotless for the clients' safety. (Trial Transcript, page 913, lines 14-17.)

446. Plaintiff Truitt cannot think of anything that went on in the house that was not related to the care, safety, protection, and training of the clients. (Trial Transcript, page 915, lines 12-15.)

ANGELA MCVAY

447. During her employment with Incor, Plaintiff Angela McVay worked as an Habilitation Training Specialist ("HTS") at the 6 Street house with Jamie Breen, Christie Ballard and Joe Smith. She later moved to the 321 North 15th Street house with Christie. (Trial Transcript, page 918, lines 1-8.)

448. Plaintiff McVay was quite credible and appeared to have been an excellent HTS.

449. Plaintiff McVay agrees that one of the goals of the residential program is to teach the clients the daily skills of living and that is

an effort to normalize their lives. (Trial Transcript, page 935, lines 8-14.)

450. Plaintiff McVay read and signed the Habilitation Training Specialist job description. (Trial Transcript, page 937, lines 10-13; Plaintiffs' Exhibit 177, pages Plaintiffs' -06045 – Plaintiffs' -06046.)

451. One-hundred percent of Plaintiff McVay's time as spent trying to accomplish the goals and objectives of the HTS job description. (Trial Transcript, page 937, lines 18-22.)

452. Plaintiff McVay has not tried to reconstruct or recreate her time to give a better estimate of what she did on a daily basis. (Trial Transcript, page 937, lines, line 23 – page 938, line 8.)

ALICE SMITH

453. Plaintiff Alice Smith worked as an HTS in the 2200 Turner house. (Trial Transcript, page 950, lines 23-24.)

454. Plaintiff Smith appeared to be a fairly credible witness.

455. Plaintiff Smith's job duties included getting the clients up, make sure they had their breakfast and medication, help them bathe and get dressed for the day, and clean the home. (Trial Transcript, page 951, lines 8-19.)

456. The clients Plaintiff Smith provided HTS services to were profoundly disabled. (Trial Transcript, page958, lines 2-8.)

457. Plaintiff Smith agreed that since these clients have habits of putting things in their mouths and trying to swallow them, their house needed to be kept clean for their safety. (Trial Transcript, page 958, line 14 – page 959, line 7.)

458. Plaintiff Smith agreed that the communication log was critically important for the care and protection of the clients. (Trial Transcript, page 959, line 23 – page 960, line 3.)

RUBY MCGEE

459. Plaintiff Ruby McGee worked as an HTS on several houses, including 2200 Turner, 551 Sherwood and 300 North 40th. (Trial Transcript, page 962, lines 3-10.)

460. Plaintiff McGee appeared very unsure of herself and her testimony.

461. Plaintiff McGee's job duties included doing laundry, changing briefs, cleaning, and taking the clients out into the community. (Trial Transcript, page 962, lines 14-19.)

462. Plaintiff McGee agrees that the goal of the residential program was to normalize the lives of the clients to the extent possible and the HTS were supposed to teach the clients the skills of independent living. (Trial Transcript, page 967, lines 9-17.)

463. Plaintiff McGee read and signed the Habilitation Training Specialist job description. (Trial Transcript, page 967, line 22-24; Plaintiffs' Exhibit 181, pages Plaintiffs' -06101-06102.)

464. The job junctions Plaintiff McGee were to provide care, training, protection and fellowship to the clients. (Trial Transcript, page 967, line 25 – page 968, line 3.)

465. Everything Plaintiff McGee was doing for the clients was for the clients' benefit whether she was cleaning or documenting. Some part of that work was training and assisting the clients. (Trial Transcript, page 969, line 1-18.)

LECEIF SPRING

466. Plaintiff Leceif Spring worked as an HTS at the 915 Lakeland house for client, Keith July, assisting Kr. July with household chores. (Trial Transcript, page 971, lines 3-16.)

467. Plaintiff Spring was fairly credible as a witness.

468. Plaintiff Spring testified that part of the HTS job is to train the client and to protect the client form others and himself. (Trial Transcript, page 975, lines 17-24.)

469. Plaintiff Spring recognized the Habilitation Training Specialist job description and his signature. (Trial Transcript, page 977, line 10-25; Plaintiffs' Exhibit 195, pages Plaintiffs' -06414 – Plaintiffs'-06415.)

470. Plaintiff Spring agreed that one-hundred percent of his time was spent following the goals on the job description, except for when he had to use the bathroom. (Trial Transcript, page 978, lines 3-13.)

WAHKEETHA ATKESON

471. Plaintiff Wahkeetha Atkeson started working at Incor on September 15, 1995, and continues to work at Incor. (Trial Transcript, page 979, lines 13-15.)

472. Plaintiff Atkeson appeared to be "axe-grinder" and this adversely affected her credibility.

473. Plaintiff Atkeson works at the 505 Judy Lane house. (Trial Transcript, page 980, lines 8-10.)

474. As an HTS, Plaintiff Atkeson's job duties include cleaning the house, doing paperwork, helping the clients out in the community and interact with them. (Trial Transcript, page 980, lines 21-14.)

475. Plaintiff Atkeson agrees that one of the goals of the residential program was to normalize the lives of the clients to the extent possible and also to teach the clients to live independently. (Trial Transcript, page 991, lines 6-12.)

476. The clients at the 505 Judy Lane house are profoundly disabled and are incapable of caring for themselves in most respects of daily living. It is Plaintiff Atkeson's job to come in and do what they cannot do for themselves. (Trial Transcript, page 991, lines 13-23.)

477. Plaintiff Atkeson read and reviewed the Habilitation Training Specialist job description. (Trial Transcript, page 992,

lines 3-7; Plaintiffs' Exhibit 178, pages Plaintiffs' -06051-06051.)

478. Plaintiff Atkeson followed the goals and job duties that are outlined on the job description and spent one-hundred percent of her time doing that. (Trial Transcript, page 992, lines 8-13.)

479. The work that Plaintiff Atkeson was doing in the house needed to be done and there is no question in her mind that she was doing unnecessary work. (Trial Transcript, page 997, lines 2-10.)

DELORIS WILSON

480. Plaintiff Deloris Wilson began her employment at Incor on March 31, 2001, and left her employment at Incor on May 3, 2002. (Trial Transcript, page 1007, line 17-22.)

481. Plaintiff Wilson's attitude while testifying was the epitome of lackadaisical.

482. Plaintiff Wilson worked at the 505 Judy Lane House as an HTS. (Trial Transcript, page 1001, line 16-18.)

483. Plaintiff Wilson did housecleaning, took care of the ladies, did laundry, medications. Just about everything. (Trial Transcript, page 1002, lines 15-19.)

484. Plaintiff Wilson agrees that one of the goals of the residential program is to teach the clients the everyday skills of living and another goal was to normalize the client's life as much as possible. (Trial Transcript, page 1006, line 23 – page 1007, line 4.)

485. Plaintiff Wilson signed and read the HTS job description when she took the job as an HTS. (Trial Transcript, page 1007, line 8-10.)

486. Plaintiff Wilson agrees that the job description encapsulates providing care, protection and fellowship to the clients. (Trial Transcript, page 1007, line 11-13.

487. Plaintiff Wilson spent one hundred percent of her time trying to do those job duties. (Trial Transcript, page 1007, line 14-16.)

488. Plaintiff Wilson testified that the only thing she did that did not benefit the clients was when she cleaned a bathroom used only by the HTS. (Trial Transcript, page 1009, lines 18-21.)

KENYA WASHINGTON

489. Plaintiff Kenya Washington began her employment at Incor relevant to this litigation on November 13, 2001. She left Incor's employ on October 10, 2002. (Trial Transcript, page 1034, lines 11-18.)

490. Plaintiff Washington's testimony was sometimes contradictory, and she had a poor memory; however, she was not evasive.

491. Plaintiff Washington worked at the 919 Choctaw house, the 2200 Turner house and the 901 Erie house. (Trial Transcript, page 1020, line 21 – page 1021, line 5.)

492. Plaintiff Washington's job duties as an HTS was to assist clients in their daily activities. (Trial Transcript, page 1021, lines 6-7.)

493. Plaintiff Washington signed the HTS job description. (Trial Transcript, page 1027, line 14 – page 1027, line 9; Plaintiffs' Exhibit 175, pages Plaintiffs' -06012-06013.)

494. Plaintiff Washington's responsibilities as an HTS were to train the individuals to do the activities of daily living and try to normalize their life. A part of doing that is teach them to do the chores that needed to be done in the house. (Trial Transcript, page 1028, lines 14-20.

495. Plaintiff Washington's client, Bobby Creekmore, needed her assistance in order to do his activities of daily living. (Trial Transcript, page 1029, lines 7-13.)

496. Plaintiff Washington agrees that every activity that went on in 919 Choctaw related or was for the benefit, care, protection, and training of Bobby

Creekmore. (Trial Transcript, page 1031, lines 17-21.)

497. Plaintiff Washington agrees that the paperwork related to the benefit, care, training, and protection of Bobby Creekmore. (Trial Transcript, page 1031, line 21 – 1032, line 2.)

498. Plaintiff Washington agrees that everything that went on in the 901 Erie house, including the paperwork, all related to the care, protection and training of those clients. (Trial Transcript, page 1032, lines 16-23.)

499. Plaintiff Washington could not think of any activity at either 919 Choctaw or 901 Erie house that did not related to services being provided to the clients. (Trial Transcript, page 1032, line 23 – page 1033, line 1.)

CYNTHIA WHITFIELD

500. Plaintiff Whitfield has seen and signed the HTS job description. (Trial Transcript, page 1041, line 21 – page 1042, line 14.)

501. Plaintiff Whitfield was fidgety while testifying and constantly swiveling the witness chair. Her testimony was sometimes contradictory and not particularly credible.

502. Plaintiff Whitfield has seen and signed the HTS job description. (Trial Transcript, page 1041, line 21 – page 1042, line 14.)

503. The services Plaintiff Whitfield provided included assisting Mr. Moore with his living skills, recreate and his medicine. (Trial Transcript, page 1043, lines 8-16.)

504. It would not be possible for Plaintiff Whitfield to look back at a timesheet and be able to say how many minutes an activity took. (Trial Transcript, page 1044, line 24 – page 1045, line 3.)

505. Plaintiff Whitfield agreed that everything going on in Mr. Moore's home involved care, training, protection or assistance to Mr. Moore in his activities of daily living. Plaintiff Whitfield pursued her job 100% of the time. (Trial Transcript, page 1050, lines 5-13.)

LISA SMITH

506. Plaintiff Lisa Smith was employed by Incor between March, 1999 and November, 2001 as a Habilitation Training Specialist and house Manager. (Trial Transcript, page 1066, lines 6-14.)

507. Plaintiff Smith had a completely flat affect. It was impossible to judge her credibility.

508. Plaintiff Smith worked with Leonard Reece, Harvey Gilroy and Billy Oman, who are individuals that are total care people. (Trial Transcript, page 1054, line 23 – page 1055, line 4.)

509. Plaintiff Smith agreed that the clients' house had to be extra clean due to the

clients suffering from pica and rumination. (Trial Transcript, page 1067, lines 4-16.)

510. Plaintiff Smith was more interested in the clients' safety and protection than she was in training, as the clients were profoundly disabled. (Trial Transcript, page 1068, line 25 – page 1069, line 10.)

511. Plaintiff Smith agreed that without HTS services those clients would be in a serious condition. (Trial Transcript, page 1069, lines 14-16.)

LESA HORNEY

512. Plaintiff Lesa Horney works as an HTS at the 505 Judy Lane house. (Trial Transcript, page 1077, lines 14-17.)

513. Plaintiff Horney appeared very intelligent, but was also an "axe-grinder." This adversely affected her credibility.

514. Plaintiff Horney agrees that one of the goals of the residential program is to normalize the lives of the clients and another goals is to teach the clients to live

as independently as possible. (Trial Transcript, page 1096, lines 12-17.)

515. Plaintiff Horney read and signed an HTS job description. (Trial Transcript, page 1096, lines 18-25; Plaintiffs' Exhibit 172, pages Plaintiffs' -05884-05885.)

516. Plaintiff Horney, to the best of her ability, spent 100% of her time trying to accomplish the goals in the HTS job description. (Trial Transcript, page 1097, 4-6.)

517. Plaintiff Horney agrees that there is not any activity that occurs in 505 Judy Lane that is not designed to help the clients. (Trial Transcript, page 1106, lines 1-5.)

NICOLE PIERCE

518. Plaintiff Nicole Pierce worked as an HTS at 2200 Turner, 901 Erie and 300 North 40th. (Trial Transcript, page 1109, lines 10-25.)

519. The Court could not evaluate Plaintiff Pierce's credibility.

520. Plaintiff Pierce reviewed and signed an HTS job description. (Trial Transcript, page 1119, lines 15-17.)

521. Plaintiff Pierce testified that the only thing that she did at the 2200 Turner house that did not relate to giving care, protection or training to the clients was writing in the spiral notebook. (Trial Transcript, page 1120, lines 6-22; page 1122, lines 16-19.)

522. The meetings Plaintiff Pierce were involved with related to the care, protection, training and safety of her clients. (Trial Transcript, page 1125, lines 11-14.).

523. Plaintiff Pierce has not attempted to recreate her time to determine how long a particular activity took. (Trial Transcript, page 1127, line 3-10.)

FRANCES WOOD

524. Plaintiff Frances Wood has been employed by Incor from August 16, 1993 to the present as a Habilitation Training Specialist. (Trial Transcript, page 1128, lines 9-13.)

525. Plaintiff Wood appeared highly evasive during cross-examination.

526. Plaintiff Wood works in the 505 Judy Lane house. (Trial Transcript, page 1128, lines 14-15.)

527. Plaintiff Wood agrees that the IP plan embraces the goal of normalizing the client's life to the extent possible, and that the intent is to help the clients live as independently as possible. (Trial Transcript, page 1132, lines 8-17.)

528. Plaintiff Wood agrees that the goals of the residential program vary from client to client. (Trial Transcript, page 1133, lines 23 – page 1134, line 5.)

529. Plaintiff Wood states the clients at 505 Judy Lane could not live there without her services. (Trial Transcript, page 1134, lines 16-23.)

530. Plaintiff Wood agrees that all of the activities that go on at Judy Lane are for the benefit and are related to the care of

the clients. (Trial Transcript, page 1134, lines 6-10.)

SHERRY SALLIS

531. At the conclusion of Plaintiffs' evidence, the deposition of Plaintiff, Sherry Sallis, taken on April 1, 2004, was admitted into evidence based on Ms. Sallis' unavailability to testify live at the time of trial. Based upon this Court's review of Ms. Sallis' deposition, this Court finds the following facts:

532. Plaintiff Sherry Sallis was employed at Incor beginning December 11, 1996 and worked up until August 7, 2002, when she went on medical leave. (Deposition, page 12, lines 9-20.)

533. During Plaintiff Sallis' employment at Incor, she was always an HTS. (Deposition, page 13, lines 19-21.)

534. With the exception of one shift, Plaintiff Sallis worked as an HTS at 704 Foltz Lane

and 810 Sherwood. (Deposition, page 14, lines 5-12.)

535. The clients with which Plaintiff Sallis worked were non-verbal and required a great deal of care. (Deposition, page 16, lines 11-13; page 16, line 23 – page 17, line 24.)

536. Ms. Sallis spent one-hundred percent (100%) of her time performing the duties of an HTS as set forth in her job description. (Deposition, page 19, lines 7-9; page 19, lines 15-21.)

537. Regardless of her activities, Ms. Sallis felt like she was helping the clients at all times. (Deposition, page 19, line 25 – page 20, line 4.)

538. The training time that Plaintiff Sallis is claiming was for courses required for her employment (Deposition, page 25, lines 8-10.)

539. Plaintiff Sallis was paid a training voucher for the time she spent receiving training.

(Deposition, page 25, line 17 – page 26, line 2.)

540. Plaintiff Sallis did not complain to Incor about being paid with the voucher rather than hourly while she was employed at Incor. (Deposition, page 26, lines 15-18.)

541. Plaintiff Sallis did not complain to the Oklahoma Department of Labor or U.S. Department of Labor concerning not being paid the premium portion of her overtime hours. (Deposition, page 28, line 21 – page 29, line 3.)

542. Plaintiff Sallis believes the clients moved from Foltz to Sherwood because the rent went up. (Deposition, page 35, lines 15-20.)

543. The house was furnished by the girls (clients) and their families. (Deposition, page 37, lines 8-15.)

544. Plaintiff Sallis did not have a key to the clients' house. (Deposition, page 37, lines 17-19.)

545. The materials and documents kept at the Sherwood house all related to the care and treatment provided to the clients. (Deposition, page 38, lines 11-19; page 36, lines 7-14, page 39, lines 3-7.)

546. Plaintiff Sallis believes Incor received money to pay her wages from the government. (Deposition, page 41, lines 18-22.)

547. Plaintiff Sallis spent approximately 15 to 30 minutes cleaning he house per day. (Deposition, page 44, line 20 – page 45, line 6.)

548. Plaintiff Sallis was provided with a list of activities for way in which she could assist and train the clients. (Deposition, page 49, line 24 – page 50, line 2.)

549. The clients could not clean the house, or do the dishes, and everything she did was designed for the clients' benefit. (Deposition, page 51, lines 11-18.)

Plaintiffs Lajoya Davis And Tia Sallis Did Not Testify At Trial

FACTS RELEVANT TO PLAINTIFF KENT FOWLER'S OVERTIME CLAIMS

550. From August 26, 2001, throughout the duration of his employment, Mr. Fowler served as a Program Coordinator ("P.C.") at Incor. (Plaintiffs' Exhibit 160, page 9619.)

551. Plaintiff Fowler was evasive during his testimony. Furthermore, his shifty and fidgety body language while testifying adversely affected his credibility.

552. As a P.C., Mr. Fowler followed the job description for Program Coordinator. (Trial Transcript, page 1262, line 8 – page 1263, line 11; page 1262, lines 1-4; Plaintiffs' Exhibit 160, page 5586.)

553. As a P.C., Mr. Fowler was paid a salary of $25,000.00 annually. (Trial Transcript, page 1269, lines 20-22; Plaintiffs' Exhibit 160, page 5586.)

554. Mr. Fowler understood that a P.C. was a management position at Incor. (Trial Transcript, page 1269, lines 17-19.)

555. As a P.C. at Incor, Mr. Fowler fulfilled his responsibilities as a manager. (Trial Transcript, page 1262, line 19 – page 1263, line 11; page 1264, line 23 – page 1265, line 16; page 1270, line 20 – page 1272, line 1; page 1273, lines 3-6.)

556. In the Fall of 2001, Mr. Fowler began experiencing financial problems and requested that he be allowed to moonlight as an HTS. (Trial Transcript, page 1273, lines 19-23.)

557. As a courtesy to Mr. Fowler, he was initially allowed to moonlight as an HTS so that he could make extra money. (Trial Transcript, page 1273, line 24 – page 1274, line 5.)

558. As of August 15, 2002, Mr. Fowler was approved to work hourly in the clients' homes as an HTS in addition to his duties as

a P.C. (Trial Transcript, page 1266, line 16-22; Plaintiffs' Exhibit 160, page 05589.)

559. For his work as an HTS, Mr. Fowler was paid an hourly wage of $7.37 in addition to his salary as a P.C. (Plaintiffs' Exhibit 160, page 05589.)

560. Due to his need for extra money, Mr. Fowler was allowed to moonlight as an HTS while still receiving his salary as a P.C. (Trial Transcript, page 1274, lines 22-25; page 1275, lines 4-13.)

561. The duties Mr. Fowler performed as an HTS were not the same duties he performed as a P.C. (Trial Transcript, page 1275, lines 17-19.)

562. Mr. Fowler denies that he was acting as a P.C. while employed as an HTS. (Trial Transcript, page 1275, line 20 – page 1276, line 1.)

REBUTTAL TESTIMONY FOR DEFENDANTS

MICHAEL PEASE (Trial Transcript pp. 1191-1236)

563. Michael Pease worked for Incor since 1989 as both a house manager and an HTS.

564. Pease was extremely knowledgeable and competent. He was very credible.

565. Pease testified in detail regarding the documentation performed by an HTS on behalf of a client.

566. Pease testified that he took between 10 to 15 minutes per shift to perform documentation.

567. Pease testified in detail regarding how an HTS fulfills its goals and trains or attempts to train the client.

568. Pease listened to all Plaintiffs testify.

569. He stated that if some of the Plaintiffs were carrying out their duties as they described (i.e., cleaning rather than training), they were not fulfilling their duties as an HTS and were actually harming the clients.

570. The court found Pease's testimony instructive and enlightening. It was very helpful in resolving some factual disputes.

CONCLUSIONS OF LAW

Employer Status Of Dependants Ed and Betsy Breen Under the FLSA

1. Both Defendants, Ed and Betsy Breen, meet the definition of an "employer" under 29 U.S.C£ 203(d) for purposes of expanding liability beyond the corporate defendant, Incor.

2. The Court ruled from the branch that Mr. and Mrs. Breen are employers under the FLSA and would be jointly and severally liable for any adverse judgment herein. (Tr. 596.7-20). That ruling is hereby reaffirmed.

Plaintiffs' Training Time Claims

3. Plaintiffs claim entitlement to back wages, and overtime wages where applicable, for time spent receiving training either to become or remain qualified as an HTS and provide HTS services in the State of Oklahoma (Plaintiffs' "Training Time Claims").

4. Plaintiffs' training time claims are governed by 29 C.F.R. §785.27, which enumerates four criteria which must be met before training time is not considered compensable:

   a. Participation in the training is outside the employee's regular working hours;
   b. Participation is in fact voluntary;
   c. The training course is not directly related to the employee's job; and,
   d. The employee does not perform any productive work during such training.

5. This Court previously considered Plaintiffs' Training Time Claims when entertaining Incor's multiple motions for summary judgment. This Court denied Incor's motions with respect to Plaintiffs' Training Time Claims on the grounds that questions of fact remained as to whether the HTS' "participation is involuntary." In the training as set forth in 29 C.F.R 785.27(b).

6. With respect to Plaintiffs' claims fro training time, this Court recognizes the expertise of the United States Department of Labor in interpreting and applying 29 C.F.R 785.27 and affords the agency's opinion the highest level of deference under Chevron, U.S.A v. National Resources Defense Counsel, Inc., 467, U.S. 837, 104 S. Ct. 2778, 81 L.Ed. 694 (1984).

7. This Court specifically recognizes the opinion letter from the Department of Labor Wage and Hour Division dated September 9, 1996, which states in pertinent part:

> However, where a state requires individuals to take training as condition of employment with any employer in the childcare field-e.g., continuing education required of an individual to be licensed to practice a profession-attendance at such training would be voluntary and this criterion met, provided the employee does not impose

> additional requirements on the employee such as taking particular courses.

(Defendants' Exhibit 40, page 0124.) (emphasis in original.)

8. The DHS required Incor to provide trained employees, as defined and circumscribed by the DHS through its contracts with Incor.

9. The undisputed evidence received at trial was Incor neither dictated which courses were taken by the HTS nor required additional training on top of that required by the DHS.

10. In scheduling the HTS for training, Incor did not impose additional requirements upon the HTS. Incor acted merely as a conduit or broker of the training required by the DHS.

11. Moreover, Incor's tracking and scheduling of the HTS state-mandated training was both prudent of Incor and convenient for the HTS. First, because Incor stood to repay the DHS the proceeds for any service hours

performed by unqualified HTS, which would essentially serve as a penalty because in all likelihood the offending HTS would have already been paid for the hours, Incor's financial interest dictated that the qualifications and continuing education of their HTS be monitored and the DHS requirements be followed. Second, by scheduling the HTS for required training and providing them the opportunity to reschedule the training, Incor's actions would seem to be more of a convenience to the HTS, as opposed to an additional requirement.

12. In addition to the "Voluntariness" element, the Court finds that all other necessary elements of 29 C.F.R. § 785.27 were satisfied by the evidence received and reviewed by this Court, and thereby

judgment on the training time issue is entered in favor of the Defendants.[12]

Plaintiffs' Challenge to Defendants' Use of Companionship Exemption and Claims for Back Overtime Pay

Overtime Compensation

13. The payment of overtime wages is governed by the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq.

14. Under the FLSA, hourly workers must be compensated at a rate of one and one-half times their regular hourly wage for all hours worked in excess of 40 hours per work week. 29 U.S.C. § 207(a)(1)

15. Incor is an employer covered by the overtime provisions of the FLSA.

16. Exemptions from the FLSA must be narrowly construed. Welding v. Bios Corp., 353 F. 3d 1214, 1218 (10th Cir.2004).

---

[12] The Court also relies upon Exhibit 40 regarding the third element, in that the training involved herein appears to have provided instruction of general applicability which would enable an individual to gain or continue employment with any employer in the field.

Companionship Exemption

17. The "Companionship Services Exemption" at 29 U.S.C. § 213(a)(15) provides that the overtime provisions of § 207 do not apply to: "any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary)".

18. The exemption also authorizes the Secretary of Labor to promulgate regulations interpreting the terms contained in the companionship exemption.

19. Title 12, part 552 of the Code of Federal Regulations governs the administration of the companionship services exemption.

20. The term "companionship services" is defined in 29 C.F.R. § 552.6 to mean:

> those services which provide fellowship, care and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs. Such services may include housework related to the care of the aged or infirm person such as bed making, washing of clothes, and other similar services. They may also include the performance of general household work: Provided, however, that such work is incidental i.e., does not exceed over 20 percent of the total weekly hours worked...

21. The regulations define "domestic service employment" as "services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed." 29 C.F.R § 552.3.

22. The United States Court of Appeals for the Tenth Circuit has held that the domestic service employee need not be employed

directly by the person receiving the services or by that person's family for the exemption to when the domestic apply. The exemption can apply even when the domestic services employee is actually employed by a service agency, such as Incor. (See, Welding v. BIOS, 353 F.3d. 1214 at 1217 n.3 (citing Johnston v. Volunteers of Am., Inc., 213 F. 3d. 559, 562 (10th Cir. 2000)[13].

23. An employer asserting that it is exempt from the FLSA overtime requirements "has the burden of establishing the exemption affirmatively and clearly," Schoenhals v. Cockrum, 647 F.2d 1080, 1081 (10th Cir. 1981). In an unpublished opinion, the Tenth Circuit stated that the "clear and affirmative" evidence standard for an

---

[13] Plaintiffs have urged the Court to follow Coke v. Long Island Care at Home, Ltd., 376 F.3d 118 (2nd Cir. 2004), and to find 29 C.F.R. §552.109(a) [the regulatory basis for permitting such third party employment] invalid. This Court is bound to follow Tenth Circuit Precedent.

employer to establish an FLSA exemption in the Tenth Circuit is "merely a different articulation of the...preponderance of the evidence standard, as applied to a remedial statue which is to be narrowly construed." See, Neville v. U.S. Fidelity and Guaranty Company, 83 F. 3d. 432, 1996 WL 194754 (10th Cir).[14]

Private Homes

24. In Welding, infra, the Tenth Circuit indicates that the concept of a "private home" under the applicable regulations should be viewed on a continuum. At one end of that continuum is "'[a]traditional family home in which a single family resides',

---

[14] In a published opinion, the Tenth Circuit stated that the private home element must be proven "clearly and unmistakably." Welding, 353 F. 3d at 1220. To this Court's ear, the phrase is closer to "clear and convincing evidence." Should the Tenth Circuit ultimately issue a published opinion adopting the "clear and convincing evidence" standard, see, e.g., Shockley v. City of Newport News, 997 F.2d 18, 21 (4th Cir. 1993), it would not disturb this Court's findings regarding the exemption issue in this case. The Court finds defendants have met their burden of proof under either standard.

which clearly constitutes a private home. At the other end of the continuum is 'an institution primarily engaged in the care of the sick, the aged, the mentally ill or a boarding house used for business or commercial purposes,' which clearly do not constitute private homes." Welding, at 1218 (citing Bowler v. Desert Village Ass'n, Inc., 922 P.2d 8, 13 (Utah 1996).)

25. In order to properly evaluate each client residence on the continuum described in Welding, the Court received evidence concerning each of the residences involved and applied the governing factors in an effort to determine "who has the ultimate management control of the living unit and whether the living unit is maintained primarily to facilitate the provision of assistive services." Id at 1219. This Court makes note of the following factors as set forth in Welding:

a. Whether the client lived in the living unit s his or her private home before beginning to receive services

In this case, the Court has evaluated numerous homes in which Incor provided HTS services. Many of the homes evaluated by this Court during earlier stages of this litigation were owned by the client's families and the client was living at that residence prior to receiving services from Incor. Those homes were summarily determined "private homes," for purposes of the companionship exemption.

At trial, evidence was introduced that many of the clients were not living at the specific residence in issue prior to receiving services from Incor. More importantly, however, the uncontradicted evidence at trial was that Incor's clients were always allowed to freely move into different residences and with different roommates, if they so choose. Indeed, one client lived in four different residences at issue during the relevant period of time. Thus, by the time

period relevant to this lawsuit, many of Incor's client had changed homes after Incor became the service provider. Such freedom of movement by the clients in the Residential Program suggests no control on Incor's part regarding the location of the clients' homes.

Further, there was no evidence to suggest that Incor moved the clients to any residence for Incor's convenience or business purposes. Much like Incor's overall base of clients, the residences at issue were/are spread out among various town and counties throughout northeastern Oklahoma. Indeed, testimony elicited at trial confirmed that the movement of clients into different homes was actually an inconvenience to Incor. Thus, the clients' homes do not appear to be geographically grouped together for Incor's convenience.

b. Ownership of the Residence

All of the homes at issue were/are owned by third parties. Uncontradicted evidence was received by this Court at trial that none of the

Lessors/Landlords had any affiliation with Incor. Moreover, Incor did not negotiate or sign client's leases/ rental agreements. Finally, no evidence was presented at trial that Incor had any possessory interest in, or right to, the client's homes.

c. Management and Maintenance of the Residence

Incor has a service agreement with each client/guardian for whom Incor provides HTS services. Although the Service Agreements may have some unique features for a particular client, the Service Agreement always memorializes whether the client/guardian will remain responsible for certain duties of everyday living or whether Incor will assist the client with such duties. Included within many of the Service Agreements is the guardian's request that Incor assist the client with his/her finances and a list of items for which the client's money (both government subsidies and earned income) may be utilized.

Commensurate with the Service Agreement in place, Incor would assist the client in handling/spending his or her money for: grocery shopping; bill payments; recreational activities, etc. However, the uncontradicted evidence received by this Court at trial was that the client's money was utilized to provide the essential things that he or she needed to live at the residence. Further, to the extent possible, clients were given choices regarding their essentials (i.e., choice of clothes, choice of food; choice of furnishings for their homes, etc.) and encouraged to participate in those choices. Additionally, each Service Agreement between Incor and the client/guardian specified that the client agreed to be responsible for all aspects of home management and personal daily living needs. Moreover, the uncontradicted evidence at trial was that none of Incor's money is utilized in providing the essentials at any client home.

d. Potential Continuity of One Client in the Residence

As referenced in factor 2 above, Incor is neither the Leasor nor the Leasee of any of the client's residences, has no affiliation with any of the client's landlords, and does not sign the client's residence and there is no reason to believe a client could not remain in their home in the event Incor's services were terminated.[15] Indeed, Incor's services were terminated at 915 Lakeland without affecting the client's continued residence there.

e. Difference Between Cost/Value Of The Services Provided And The Total Cost Of Maintaining The Residence

Commensurate with the Service Agreements received and reviewed by this Court as exhibits at trial and the testimony of multiple witnesses, the HTS services were paid in full by the DHS (i.e., the client paid nothing for the services). Conversely, the client was responsible to "pay up to 90% of the income, not to exceed $14.00 per

---

[15] A landlord may not discriminate against the disabled. See 42 U.S.C. § 3604(f)(1)(A).

day" to cover the expenses of maintaining the living unit (i.e., rent, insurance, utilities, groceries, etc.) Thus, the cost of the HTS services to the client was not any portion of the total cost to the client for maintaining his or her home.

f. Use Of The Residence For The Provider's Own Business

Incor did not reserve space in the client's home for its own business purpose. While the HTS prepared documentation concerning the client's care and health while in the client's home, Incor did not reserve office space in the client's home nor equip any part of the client's home as an office.

The preparation of client documentation in the client's home by HTS is easily distinguishable from the facts in Johnston v. Volunteers of Am., Inc., 213 F. 3d 559 (10th Cir. 2000) (cited in Welding, at 1220). In Johnston, the service provider reserved the right to appropriate a room to use as an office for the HTS. In the instant case, the overwhelming evidence presented at trial

demonstrated that no portion of the client's residence was "off limits" to the client or reserved from the clients. Incor's clients had complete access to their homes and its contents with the exception of the medication lock boxes. Indeed, there are stark differences between the offices reserved in the Johnston case and this matter, since most of the HTS prepared their documentation at the kitchen table or on the living room sofa, as opposed to the reserved office/bedroom in Johnston.

In addition to the evidence received and outlined above, Welding, Id. at 1220, also allow for "any other factors which may be applicable" to be considered when evaluating the "private home" nature of the client's residence. Within the evidence presented, this Court makes specific note of the following additional factors that indicate the "private home" nature of the residences at issue: client/guardian's selection of the home, client/guardians choice of roommates (if any), client's choice of home décor, client's

choice of how furnishings are arranged in the homes and retention and control of the home's key by the client. The most important of the factors presented at trial is that the client/guardian retains control over access to the home and may even dismiss an individual HTS from providing him or her service.

The Nature of the HTS Services and the 20% Exemption

26. In addition to challenging the "private home" status of the residences involved, Plaintiffs assert that the HTS services provided were not "companionship services' and claim an exception to the companionship services exemption, in that they claim to have spent more than twenty percent (20%) of their time engaged in the performance of "general household work" and therefore the "companionship services" exemption does not apply.

27. The credible evidence received by this Court demonstrated that the services

provided by Incor were indeed "companionship services" and that the plaintiffs failed to prove the household work involved which was unrelated to the client was more than 20% of the total weekly hours worked.

28. First, Plaintiffs' claim that their services were not "companionship services" in that they provided the clients with training in the skills of everyday living and that "training" is not encompassed within the definition of companionship services. Second, Plaintiffs suggest that documentation prepared while on shift was not a service to the client and therefore should not qualify for the exemption. This Court rejects these arguments.

29. With respect to the "companionship services" this Court recognizes that the Code of Federal Regulations defines "companionship services" in perhaps the broadest terms possible as "fellowship,

care and protection." 29 C.F.R. § 552.6. This Court is convinced that training is reasonably embodied within the concepts of "fellowship, care and protection." Without question, a certain amount of training provided to the clients would serve for their protection (i.e., not playing with matches; safety precautions in the kitchen; safeguards to be taken in the community, etc.). More significantly, the training provided to the client regarding the skills of everyday living is certainly subsumed within the definition of "care." In this instance, the "care" provided to the client was done so in the form of training the client to learn certain skills (such as personal hygiene; cooking; money management; dressing, etc.). Clearly, from the evidence, the "training" or "care" provided to the client was tailored to the client's level of disability, with some clients being considered "total care" others almost fully

self-sufficient, but in either event the services provided meet the definition of "fellowship, care and protection" as set out in 29 C.F.R § 552.6.

30. Plaintiffs assert that they spent more than 20% of their total weekly hours worked engaged in general housework not related to the care of the client. In support of this contention, Plaintiffs provided self-serving broad estimates[16] which the court found lacked creditability. Within these broad estimates, plaintiffs did not provide details of the tasks included within their estimates (to determine whether the task was related to the client's care) nor any basis for their estimates (such as reconstructing their time from available documentation).[17]

---

[16] See Plaintiff's Proposed Findings of Fact and Conclusions of law at 22-27.

[17] The "20% rule" has been called an exception to the companionship services exemption. Terwilliger v. Home of Hope, Inc., 42 F.Supp.2d 1231, 1252 (N.D. Okla. 1999). The Special Master/Magistrate in that case recommended that the district court conclude that the burden remain with the

31. The "general household work" exception to the companionship services exemption provides that the exemption does not apply where "general household work" exceeds 20% of the total weekly hours worked. 29 C.F.R. § 552.6.

32. The regulation distinguishes between "household work related to the care of the aged or infirm persons" and "general household work." Id.

33. The terms "general household work" is not defined within the regulations concerning the companionship exemption. Several courts, however, have attempted to

---

employer. Id. at 1253. This Court disagrees. Rather than require an employer to prove a negative, this Court places the burden on the plaintiff to affirmatively prove by a preponderance of the evidence the number of hours to qualify for the exception. (See also Tr.608.25—609.1-9).

The 20% rule "is not clearly contravened by either the text of the statute or the intent of Congress to the extent it is discernable." Coke v. Long Island Care at Home, Ltd., 376 F.3d 118, 127 (2nd Cir. 2004). Neither side in this litigation has argued the provision is not entitled to "Chevron deference," although the Court raised the issue during trial. (Tr.1189.13-14; 1190.15-18.). The Court declines to find the provision invalid.

define "general household work" and work related to the care of the aged or infirm persons" and "general household work" for purposes of the 20% exception. (See, Toth v. Green River Regional Mental Health/Mental Retardation Board, Inc., 753 F. Supp. 216, 217 (W.D. Ky. 1989); McCune v. Oregon Senior Services Div., 643 F. Supp. 1444, 1450 (D. Or. 1986), aff'd 894 F2d 1107 (9th Cir. 1990); Terwilliger v. Home of Hope, Inc., 42 F.Supp. 2d 1231, 1252 (N.D. Okla. 1999); Bowler v. Deseret Village Assoc., Inc., P.2d 8, 15 (Utah 1996).)

34. This Court concludes that the language "other similar services" signifies the Secretary's intent not to limit the scope of services "related to the care of the...person" to those items specifically enumerated in 29 C.F.R. § 552.6

35. In light of the regulatory language ad case law reported above, this Court has analyzed the particular tasks performed by

the HTS to determine whether the "task is necessary for the care of habilitation training of a particular client. If it is, then the task cannot be "general household work" unrelated to the individual client, and it does not cont toward the 20% exception. Instead, the companionship exemption applies to the task, and the employer is not required to pay overtime wages to the plaintiff who performs it" Terwilliger, Id. at 1253. Thus, in a 40 hour work week, each plaintiff would have to perform eight hours of work unrelated to the care of the client in order to trigger the 20% exception.

36. In this matter, each Plaintiff read and understood Incor's job description for Habilitation Training Specialist and agreed that they spent all of their time attempting to fulfill their job descriptions. Significantly, the HTS job description lists s duties training of the client monitoring the client's safety

and well-being, but does not mention the performance of general household work. Indeed, where possible, the client's training was to incorporate household work. IN other instances, the HTS performed the task in order to care for the client because the profound nature of the client's disability prohibited meaningful training. Regardless as to whether the activity is labeled "training' or "care", the service provided clearly met the letter and spirit of the companionship exemption.

37. To the extent Plaintiffs may have performed general household work beyond that necessary for training the client or caring for the health and safety of the client, this Court is convinced that those hours could not have exceeded over 20% of the total weekly hours worked.

38. Therefore, despite Plaintiffs' claim regarding the 20% exception, this Court concludes that Incor has shown that no

Plaintiff spent in excess of 20% of his or her total weekly hours engaged in general household work.

39. In sum, the credible evidence admitted at trial demonstrated that the HTS service provided by Incor were "companionship services" under the meaning of 29 U.S.C § 213(a) (15). Further, the homes at issue were "private homes" for application of the companionship exemption. Additionally, no plaintiff spent greater than 20% of his or her total hours worked performing general household work unrelated to the care of their client. Therefore, judgment will be entered in favor of the Defendants with respect to Plaintiffs' claims for back overtime. Under the testimony in this case, the Court would reach the same result even if the Court were to place the burden of proof regarding the 20% rule on the Defendants.

whether preponderance of the evidence or clear and convincing evidence.

40. Plaintiffs, Lajoya Davis and Tia Sallis did not testify at trial and therefore, judgment against them is entered in favor of Defendants on all issues.

Plaintiffs' Claims Regarding Paperwork

41. Plaintiffs assert they spent a substantial portion of their time preparing documents regarding the client's health, care and activities. Plaintiffs' argument at trial was that this activity does not constitute "companionship services" and thus does not come within 29 C.F.R. § 552.6. In other words, the issue of the "20% rule" is not even reached. (See Tr.1175.20-22; Tr.1178.14-24).

42. This issue was not raised in the Pretrial Order, but the Court exercised its direction to permit it. (Tr.1179.19-25)[18].

---

[18] Plaintiffs now appear to have abandoned the issue as framed in the colloquy. (See Plaintiffs' Proposed Findings of

43. Plaintiffs' testimony is again rejected by the Court as consisting of self-serving estimates that fail to establish with sufficient certainty the amount of time spent on documentation. Nevertheless, in defendants' case-in-chef and in the rebuttal testimony of Michael Pease, evidence was presented that 10-15 minutes per shift was spent on documentation. (See Defendants' Proposed Findings of Fact and Conclusion of Law at 39, ¶15.) The Court adopts this figure for the sake of argument.

Fact and Conclusions of Law at 46: "Employees also spent a great deal of time completing and reviewing paperwork required, not by the client, but by Defendants and the State of Oklahoma. Such time spent also is applied to the 20% nonexempt work under the exception [to] the 'companionship services' exemption.") In their proposed computation of damages, plaintiffs have provided no separate calculations regarding time spent on paperwork.

In the event the Tenth Circuit (in the inevitable appeal of this case) concludes plaintiffs have not abandoned the argument, the Court will nevertheless address the issue as framed at trial, as have defendants in their Proposed Findings of Fact and Conclusions of Law. Plaintiffs' present argument (i.e., invoking the 20% rule) is rejected for the reasons previously stated.

44. In order to evaluate plaintiffs' contention, the Court received into evidence exemplars of forms utilized by the HTS, as well as documentation completed by the plaintiffs themselves. The Court also received undisputed testimony that most of the documentation generated was required by the DHS for purposes of evaluating the client's health, well-being and progress toward goals as determined primarily by the client's I.P. team. Thereafter, the data collected is utilized in evaluating and adjusting the client's goals, healthcare and well being, given the number of different people charged with that responsibility. Based upon that evidence, this Court concludes that the overwhelming majority of any spent by the HTS preparing documentation is related to the care of the client and that the time spent by the HTS preparing documents indirectly related or wholly unrelated to the

care of the client was de minimus and does not disqualify the services provided from being "companionship services."[19] See also Court Exhibit #1, which details the different "Incor Forms" used in the homes. The Court is persuaded the very nature of the tasks recorded on these forms supports the Court's conclusion.

Plaintiff Kent Fowler's Overtime Claim

45. The evidence demonstrates that Mr. Fowler met the criteria of "executive exemption" from the overtime regulations set forth in

---

[19] Under one reading of the regulation, the filling out of paperwork does not directly provide "fellowship, care and protection" to the client and thus is not "companionship services" under § 552.6, as plaintiffs asserted during trial. A court may look past the express language of a regulation when it is ambiguous or where a literal interpretation would lead to an absurd result or thwart the purpose of the overall statutory scheme. First Nat. Bank of Chicago v. Standard Bank & Trust, 172 F.3d 472, 477 (7th Cir. 1999). The Court is persuaded that to hold the brief periods involved herein are overtime-compensable, when such paperwork is necessary both for funding and to shape the client's care, would be an absurd result and would thwart the purpose of the overall statutory and regulatory scheme.

the FLSA under both 29 U.S.C § 213(a)(1) and 29 C.F.R. § 541.1 while acting as a P.C.

46. However, Mr. Fowler claims that he worked as an HTS during his tenure as a P.C., and spent greater than 20% of his time engaged in non-executive/non-managerial duties which would disqualify him from the exemption under U.S.C § 213(a)(1).

47. Having received and reviewed evidence on Mr. Fowler 's claim, it is clear that his "second duty" as an HTS for which he was paid a separate hourly rate on top of his salary did not disqualify him from the exemption to overtime wages under U.S.C. § 213(a)(1).

48. This Court specifically noted that the job description for P.C. and HTS are substantially different and that Mr. Fowler's own description of his job as a P.C. is different from the duties and responsibilities of an HTS. Even more important was that

Mr. Fowler's testimony that he did not act as a P.C. while working as an HTS or vice versa.

49. This Court also notes Mr. Fowler's testimony that he needed "extra money" and this is why he requested to moonlight as an HTS while holding the position as a P.C. Thus, the "second duty" was voluntary, indeed requested, and not compulsory.

50. Under 29 C.F.R. § 541.118(b), employees are expressly permitted to pay salaried employees at an hourly rate for hours worked beyond their regular schedules and not disqualify the executive exemption (See, Hartman v. Arlington co., Va., 720 F.Supp. 1227 (E.D. Va 1989) holding that Fire Shift Commanders were executives even though they received additional pay at an hourly rate for each hour worked beyond their regular schedule). (See, Fife v. Harmon, 171 F.3d 1173 (8th Cir. 1999), stating "The Secretary

has unequivocally and consistently the form of hourly overtime payment does not defeat exempt status under the salary-basis test." Id. at 1175, citing Boykin v. Boeing Co., 128 F.3d 1279, 1281 (9th Cir. 1997) (See, e.g. D.O.L. Wage & Hour Division Provisions Opinion Letter, 1997 WL 998013 (March 17, 1997).)

51. Based upon the admitted differences in the two jobs, the fact that Mr. Fowler's salary was never curtailed or reduced, that a separate hourly rate was paid to Mr. Fowler's for performing as an HTS and that it was his request for the "second duty," this Court cannot see any meaningful difference between Mr. Fowler moonlighting at Incor as an HTS or moonlighting at Wal-Mart as a cashier. Therefore, the Court enters judgment in

favor of Defendants on Mr. Fowler's overtime claims.[20]

Based upon the above Findings of Fact and Conclusions of Law, the Court hereby rules in favor of Defendants and against Plaintiffs as to all claims.

Dated this 23rd day of September, 2005.

/s/ Ronald A. White

RONALD A. WHITE
UNITED STATES DISTRICT JUDGE

[20] Should any Finding of Fact above more properly be characterized as a Conclusion of Law, or should any Conclusion of Law above more properly be characterized as a Finding of Fact, they should be so considered.

C-1

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

KENT W. FOWLER, et. al.,	)	
	)	
Plaintiffs-Appellants,	)	
	)	
v.	)	No. 05-7113
	)	
INCOR, INC., et. al.,	)	
	)	
Defendants-Appellees.	)	

FILED
United States Court of Appeals
Tenth Circuit

June 3, 2008

Elisabeth A. Shumaker
Clerk of Court

ORDER

Before **HENRY**, Chief Judge, **ANDERSON** and **MCCONNELL**, Circuit Judges.

Appellees' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court,

/s/Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk

AMERICANS WITH DISABILITIES ACT OF 1990

TITLE 42 - THE PUBLIC HEALTH AND WELFARE

CHAPTER 126 - EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES

Sec. 12101. Findings and purpose

(a) Findings

The Congress finds that

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication,

recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose

It is the purpose of this chapter

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

SUBCHAPTER II - PUBLIC SERVICES [Title II]

Part A - Prohibition Against Discrimination and Other Generally Applicable Provisions

Sec. 12131. Definitions

As used in this subchapter:

(1) Public entity

The term "public entity" means

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 24102(4) of title 49).

(2) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural,

communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

Sec. 12132. Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

Sec. 12133. Enforcement

The remedies, procedures, and rights set forth in section 794a of title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

Sec. 12134. Regulations

(a) In general

Not later than 1 year after July 26, 1990, the Attorney General shall promulgate regulations in an accessible format that implement this part. Such regulations shall not include any matter within the scope of the authority of the Secretary of Transportation under section 12143, 12149, or 12164 of this title.

(b) Relationship to other regulations

Except for "program accessibility, existing facilities", and "communications", regulations under subsection (a) of this section shall be consistent with this chapter and with the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 794 of title 29. With respect to "program accessibility, existing facilities", and "communications", such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations, applicable to federally conducted activities under section 794 of title 29.

(c) Standards

Regulations under subsection (a) of this section shall include standards applicable to facilities and vehicles covered by this part, other than facilities, stations, rail passenger cars, and vehicles covered by part B of this subchapter. Such standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 12204(a) of this title.

Supreme Court, U.S.
FILED
SEP 26 2008
OFFICE OF THE CLERK

No. 08-278

IN THE

Supreme Court of the United States

INCOR, *et al.*,

Petitioners,

v.

KENT W. FOWLER, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

STEVEN V. BUCKMAN
BUCKMAN & ROACH
A Professional Corporation
525 South Main Street, Suite 660
Tulsa, Oklahoma 74103-4521
(918) 587-1525
(918) 587-1535 facsimile

Attorney for Respondents

218419

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Does this Court wish to review issues never presented to the district court or the circuit court of appeals?

2. Did Congress intend for there to be an exemption to payment of overtime wages under the Fair Labor Standards Act ("FSLA") when employees are required to work more than 40 hours per week in the care of mentally disabled individuals?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iii
COUNTERSTATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	2
A. The Circuit's Decision Properly Interprets The "Companionship Exemption" In The Context Of A Private Home	2
B. The Reasons Given By Petitioners For Granting Their Petition Were Not Raised In The Lower Courts	8
C. Petitioners Misstate This Court's Holding In *Coke* And Misapply It to The Issues Herein	10
CONCLUSION	12

TABLE OF CITED AUTHORITIES

Page

Cases:

A.H. Phillips v. Walling, 324 U.S. 490, 65 S. Ct. 807, 89 L. Ed. 1095 (1945) 5

Coke v. Long Island Care At Home, Ltd., 376 F.3d 118 (2nd Cir. 2004) 11

Duignan v. United States, 274 U.S. 195, 47 S. Ct. 566, 71 L. Ed. 996 (1927) 9

Hormel v. Helvering, 312 U.S. 552, 61 S. Ct. 719, 85 L. Ed. 1037 (1941) 10

Johnston v. Volunteers Of America, Inc., 213 F.3d 559 (10th Cir. 2000) 5

Long Island Care At Home, Ltd. v. Coke, 127 S. Ct. 2339, 168 L. Ed. 2d 54 (2007) 10

Walters v. City Of St. Louis, MO., 347 U.S. 231, 74 S. Ct. 505, 98 L. Ed. 660 (1954) 9

Welding v. BIOS Corp., 353 F.3d 1214 (10th Cir. 2004) 5, 6

Cited Authorities

Page

Statutes:

29 U.S.C. § 201 *et seq.* 2

29 U.S.C. § 213(a)(15) 2, 3, 4

29 C.F.R. § 552.2(c) 4

29 C.F.R. § 552.3 ..... 3, 7, 11

29 C.F.R. § 552.4 4

29 C.F.R. § 552.5 4

29 C.F.R. § 552.6 ..... 3, 4, 7, 11

29 C.F.R. § 552.109(a) 10, 11

COUNTERSTATEMENT OF THE CASE

Respondents were individuals employed by Petitioners (collectively called "Incor") to provide care and assistance to mentally disabled individuals (many with an I.Q. range of 9 months to 4 years of developmental age). These employees worked to wipe noses, cook, diaper, bathe, and clean up messes 80, 90, and sometimes more than 100 hours per week without receiving overtime compensation. Employees were responsible to help train, motivate, and nurture the daily activities of those charged to their care to the extent possible. The work was demanding and required patience, alertness, and physical effort.

The Fair Labor Standards Act ("FLSA") prohibits employers from requiring employees to work in excess of 40 hours per work week without paying an overtime premium other than within limited exempt areas. The matter *sub judice* is concerned with the exemption related primarily to domestic service employment of a household nature performed by an employee in or about a private home.

Incor suggests it should be allowed *to require* employees to work excessive numbers of hours over and above the typical 40 hour work week without the benefit of overtime compensation when the work was not done in a private home. Employees are not necessarily individuals who want to contribute their entire life to taking care of others 80 to 100 hours per week, thereby depriving their own families of time, for an hourly wage barely above the minimum required.

This position is remarkably hypocritical if not overly opportunistic. Incor's officers and management did not work for below average pay, but received executive-level compensation. Even though Incor is a non-profit entity, its officers benefitted by their generous compensation packages including company vehicles. This Court should not be misled concerning Incor's opined economic plight or the industry's alleged predicament in paying overtime just as other employers are expected to do.

Incor could have paid the overtime wages owed in this dispute by simply reducing the salary of one of its officers and used the funds to pay the people actually doing the work. However, with nepotism in a family-run and controlled operation, the choice as to which officer's salary to reduce would be problematic.

REASONS FOR DENYING THE PETITION

A. The Circuit's Decision Properly Interprets The "Companionship Exemption" In The Context Of A Private Home

This action was prosecuted pursuant to the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* Petitioners claimed an exemption to payment of overtime found in the Act at 29 U.S.C. § 213(a)(15), commonly known as the companionship exemption. The exemption reads thus:

> any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to

> provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary)

29 U.S.C. § 213(a)(15).

The companionship exemption was part of Congress' amendments to the FLSA in 1974. In that same year, the Department of Labor promulgated two regulations defining the terms domestic service employment and companionship services as authorized by Congress; 29 C.F.R. § 552.3 and 29 C.F.R. § 552.6. In promulgating these regulations, the Department of Labor codified the House of Representatives construction of what companionship service employment was intended to be.

> As used in section 13(a)(15) of the Act, the term domestic service employment refers to services of a household nature performed by an employee **in or about a private home (permanent or temporary) of the person by whom he or she is employed.** The term includes employees such as cooks, waiters, butlers, valets, maids, housekeepers, governesses, nurses, janitors, laundresses, caretakers, handymen, gardeners, footmen, grooms, chauffeurs of automobiles for family use. It also includes babysitters employed on other than a casual basis. This listing is illustrative and not exhaustive.

29 C.F.R. § 552.3 (emphasis added).

> As used in section 13(a)(15) of the Act, the term companionship services shall mean those services which provide fellowship, care and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs. Such services may include household work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services. They may also include the performance of general household work: **Provided, however, that such work is incidental, i.e., does not exceed 20 percent of the total weekly hours worked.** The term "companionship services" does not include services relating to the care and protection of the aged or infirm which require and are performed by trained personnel, such as a registered or practical nurse. While such trained personnel do not qualify as companions, this fact does not remove them from the category of covered domestic service employees when employed in or about a private household.

29 C.F.R. § 552.6 (emphasis added).

The Department of Labor has stated that these regulations, along with 29 C.F.R. §§ 552.4 and 552.5 which do not apply here, are the *only* definitions *required* by 29 U.S.C. § 213(a)(15). 29 C.F.R. § 552.2(c) [40 FR 7405, Feb. 20, 1975, as amended at 44 FR 37221, June 26, 1979; 60 FR 46767, 60 FR 46768, Sept. 8, 1995].

Thus, the elements of companionship service employment, taking due care to follow the plain meaning of the language of the statute and the intent of Congress,[1] are: (1) performing household work, (2) in the *private home* of an aged or physically or mentally infirm person. Household work includes that which relates to the care of the individual and general household work, provided such household work does not exceed 20 percent of hours worked.

In *Welding v. BIOS Corp.*, 353 F.3d 1214 (10th Cir. 2004), the Tenth Circuit Court of Appeals reaffirmed principles set forth in *Johnston v. Volunteers Of America, Inc.*, 213 F.3d 559 (10th Cir. 2000), by determining that each living unit worked in by Plaintiffs must be separately analyzed to decide whether the living arrangement is a "private home" or not. The *two inquiries* to be made to determine if a living unit in which a Plaintiff worked is private are: **(1) who has ultimate management control of the living unit and (2) is the living unit maintained primarily to facilitate the provision of assistive services.**

In making the determination, the Tenth Circuit summarized six "key" factors used to consider whether a home is "private":

1. Whether the client lived in the unit as a private home before beginning to receive services? *Welding. Id.* at 1219.

---

1. *A.H. Phillips v. Walling*, 324 U.S. 490, 493, 65 S. Ct. 807, 89 L. Ed. 1095 (1945).

2. Who owns the unit, and, if owned by a third party, who leases the unit from the third party? *Welding. Id.* at 1219.

3. Who manages and maintains the unit, i.e., who provides essentials the client needs to live there (clean clothing, rent, gas, electricity, food, and water payments)? *Welding. Id.* at 1219.

4. Whether the client would be allowed to live in the unit if the client were not contracting for services? *Welding. Id.* at 1220.

5. The relative difference in the cost/value of the services provided and the total cost of maintaining the unit (including government subsides)? *Welding. Id.* at 1220.

6. Whether the service provider used any part of the unit for the providers own business purposes? *Welding. Id.* at 1220.

The circuit pointed out no single factor, nor group of factors is dispositive or absolutely essential to be determinative and each unit must be evaluated separately on a fact-by-fact basis to determine "ultimate management control". *Welding. Id.* at 1219 - 1220. The factors are logical and provide a framework for both employers and employees to use in determining if the exemption is applicable.

Where a "private home" *is* involved, the work an employee performs there must be "*domestic service employment*" such as a cook, waiter, butler, maid, housekeeper, governess, nurse, janitor, laundress, caretaker, handyman, gardener, footman, groom or chauffeur directly related to the care of the individual providing companionship services. If such services are provided in a "private home" the employer is exempted from the overtime provisions of 29 C.F.R. § 552.3. General household work must be *incidental* to the employees' job, meaning not taking more than 20% of the hours worked per week or the employees are excepted from the exemption claimed by Incor, and are owed overtime pay. 29 C.F.R. § 552.6. In that regard, Respondents prepared lengthy reports concerning training, medical history, and behavior. They were ultimately responsible for the maintenance of the units, ultimately responsible for the chores, laundry, cleaning, cooking, etc., Plaintiffs devoted between 20% and 50% of their time doing work that was not "exempt" under the FLSA.

"Companionship services" are those which provide fellowship, care and protection and can include meal preparation, bed making, washing of clothes and other similar services. But, household work (cleaning and other chores or duties not specifically advancing the training and care of the client) must not be performed more than 20% of the time or the employee *is no longer performing companionship services*. 29 C.F.R. § 552.6.

B. The Reasons Given By Petitioners For Granting Their Petition Were Not Raised In The Lower Courts

Interestingly, Petitioners advised this Court the ruling from the 10th Circuit will have a profoundly negative effect on the home healthcare sector as a whole and more employees will be needed in order to avoid payment of overtime compensation. Petitioners contend those with severe mental disabilities respond better when a fewer number of individuals work with each of the mentally disabled persons. Petitioners failed to mention the substantial turnover in their industry due to low wages, excessive work hours, and unpleasant working conditions.

In fact, the refusal to pay overtime compensation results in discrimination against these mentally impaired individuals who are completely unable to care for themselves. Respondents would suggest to this Court Incor's failure to pay overtime compensation for their excessive number of hours worked means there are fewer and fewer individuals willing to accept the job, thereby impacting the developmentally disabled's ability to receive the best available care. Employees' own financial interests are better served working at a fast-food restaurant in which overtime pay can be collected rather than providing the care to the very people Incor claims to assist.

This Court should note Petitioner was not concerned enough to raise these new reasons for granting the Petition For The Writ Of Certiorari in the lower courts. Petitioner did not assert the Americans

With Disabilities Act ("ADA") at the trial court level, nor did it raise the question with the 10th Circuit Court of Appeals even in their Application For Rehearing En Banc. Instead, Petitioner artificially created a perceived conflict for the first time in the quest for certiorari. Only in exceptional cases will this Court review questions not passed on below. *Duignan v. United States*, 274 U.S. 195, 47 S. Ct. 566, 71 L. Ed. 996 (1927).

> Of course we will not undertake to review what the court below did not decide. The state court has not passed on any question of discrimination arising from the regulations or any questions as to the interpretation or validity thereof. We have here only a very limited issue - does the statute or the ordinance on its face violate the Fourteenth Amendment.

Walters v. City Of St. Louis, MO., 347 U.S. 231, 74 S. Ct. 505, 98 L. Ed. 660 (1954).

Employees have been denied justice in this case if for no other reason than the prolonged delay of the litigation. Employees have a right to final resolution of the lawsuit without new issues to be explored for the first time at the highest court.

> Ordinarily an appellate court does not give consideration to issues not raised below. For our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties

> may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.

Hormel v. Helvering, 312 U.S. 552, 556, 61 S. Ct. 719, 85 L. Ed. 1037 (1941).

C. Petitioners Misstate This Court's Holding In *Coke* And Misapply It to The Issues Herein

Petitioners assert this Court, by its opinion in *Long Island Care At Home, Ltd. v. Coke*, 127 S. Ct. 2339, 168 L. Ed. 2d 54, has "definitively expanded application of the [companionship services] exemption". In so doing Petitioners blindly overlook that *Coke* only addressed the validity of the Department of Labor ("DOL") regulation found at 29 C.F.R. § 552.109(a). That particular regulation was propounded in 1975 and has not changed since, thus upholding its validity does not "expand" any coverage. Title 29 C.F.R. § 552.109(a) does not further define what "companionship services" are nor address the factual and legal analysis of the requirement the services be provided in a "private home". Rather, its purpose was to encompass, *after "companionship services" had already been established*, workers employed by a third-party other than by the family or household using their services. 29 C.F.R. § 552.109(a). Evelyn Coke, the named party in that matter, had stipulated she provided "companionship services" for all other purposes of the exemption

specifically to narrow the issue solely to the third-party employer validity of 29 C.F.R. § 552.109(a). *See Coke v. Long Island Care At Home, Ltd.*, 376 F.3d 118, 122 (2nd Cir. 2004).

The Tenth Circuit withheld rendering an opinion in the instant litigation awaiting the *Coke* decision to ensure the facts, law, and issues at play did not overlap. *See* Appendix A, page A-5 - 6. Here, 29 C.F.R. § 552.109(a) was not at issue and that is reflected in the Tenth Circuit opinion. Employees did not appeal arguing they should receive overtime because they were paid by Incor. Employees are entitled to overtime *because they did not work in "private homes"*. "Companionship services" were not established because Defendants failed to prove the factual and legal basis required to show the residences were private homes as required by 29 C.F.R. § 552.3. (Petitioners also failed to prove by a factual and legal basis such work is not "incidental to" or occupying more than 20% of the employee's time as required by 29 C.F.R. § 552.6, however, Petitioners do not mention their lack of evidence in their Petition For Writ of Certiorari.). The opinion in *Coke* does not bear on the Tenth Circuit's decision because the issues are entirely different. As such, the Tenth Circuit's decision herein does not frustrate the purpose of *Coke* nor does it conflict. Rather, the Tenth Circuit, by addressing the "private home" requirement of 29 C.F.R. § 552.3, upheld the validity of the DOL's regulatory definition of "companionship services".

CONCLUSION

This Honorable Court is requested to deny certiorari because:

1. the circuit court's ruling is well founded, rationally based, and properly applied the applicable law;

2. Petitioners misstated the law and the facts in its Petition which casts the issue in a posture differently than the true question resolved by the circuit; and

3. issues raised by Petitioners were not litigated in the courts below and Respondents should not be required to address new issues and challenges for the first time in this forum without evidence to rebut the surprise attacks.

In conclusion, Petitioners' attempt to sway the Court with an emotional argument that developmentally disabled individuals throughout the State of Oklahoma will no longer receive the services of HTS employees under the Tenth Circuit's unpublished opinion is unfounded and without legal or factual support.

Respectfully submitted,

STEVEN V. BUCKMAN
BUCKMAN & ROACH
A Professional Corporation
525 South Main Street, Suite 660
Tulsa, Oklahoma 74103-4521
(918) 587-1525
(918) 587-1535 facsimile

Attorney for Respondents